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No. 8104

Vol 1 1956

In the United States Circuit Court of Appeals

For the Ninth Circuit.

San Francisco Law Library.

In the Matter of

MARGARET E. TOOEY,

a Bankrupt.

MAZIE McLEOD and EDWIN J. MILLER,

Appellants,

vs.

DAN BOONE, a petitioning Creditor, and HUBERT F. LAUGHARN, trustee in bankruptcy,

Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

JAN 16 1936

PAUL P. O'BRIEN,

CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors.

For Appellants:

EDWIN J. MILLER, Esq.,

Grosse Building,

Los Angeles, California.

For Appellees:

MOTT, VALLEE & GRANT, Esqs.,

KENNETH E. GRANT, Esq.,

Citizens National Bank Building,

GILBERT B. HUGHES, Esq.,

Chapman Building,

Los Angeles, California.

ORIGINAL

United States of America, ss.

To DAN BOONE, a petitioning creditor, and to HUBERT F. LAUGHARN, trustee, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 23rd day of OCTOBER, A. D. 1935, pursuant to an appeal duly obtained and filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled, In the Matter of the Estate of Margaret E. Tooey, Bankrupt, In Bankruptcy No. 16976C, wherein Dan Boone is petitioning creditor, and Mazie McLeod and Edwin J. Miller are creditors and objectors to the petition of Dan Boone, and wherein the said Mazie McLeod and Edwin J. Miller, are appellants, and you are appellees to show cause, if any there be, why the order made by the Hon. George Cosgrave, Judge, on or about September 6, 1935, denying the petition of appellants for a reversal of the subrogation order of the Referee, in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable George Cosgrave, United States District Judge for the Southern District of California, this 23rd day of September, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth.

Geo. Cosgrave
U. S. District Judge for the Southern
District of California.

Los Angeles, California, September 23, 1935.

Service of the foregoing citation is hereby acknowledged by the appellees, Dan Boone and Hubert F. Laugharn, as trustee, by the receipt of a copy of the foregoing Citation for each of said appellees, the above date.

G. B. Hughes
K. E. Grant
Attorneys for said Appellees.

[Endorsed]: Filed Dec 27 1935 at 2:55 p. m. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of)
)
MARGARET E. TOOEY,) In Bankruptcy No. 16976-C
)
a bankrupt.)
————————————)

PETITION FOR ALLOWANCE ON ACCOUNT OF EXPENDITURES AND SERVICES IN BEHALF OF BANKRUPT ESTATE.

TO THE HONORABLE RUPERT B. TURNBULL, Referee IN BANKRUPTCY:

Comes now your petitioner, DAN BOONE, and respectfully represents to the court as follows:

I.

That prior to the adjudication of the above-named bankrupt, your petitioner, a creditor of Tooey Corporation, owned entirely by Margaret E. Tooey, the above bankrupt, was instrumental in instituting action in the United States District Court, seeking the appointment of a receiver for said corporation. Action was brought by Mazie McLeod, as complainant, she being the only non-resident creditor of the corporation known to petitioner at that time. On proceedings duly taken in the United States District Court an order was made for the appointment of a receiver, and Hubert F. Laugharn was appointed by the court to serve in such capacity. Immediately on appointment the receiver employed your peti-

tioner to act as his agent in all matters pertaining to the receivership because of petitioner's knowledge of the business of the corporation.

II.

That at said time the corporation was the owner of certain real properties, one of which was the Central Building, located at 32 North Raymond, Pasadena, California, a limit-height building, which at said time was subject to a heavy bond issue under which Bank of America National Trust and Savings Association was the trustee. That when foreclosure proceedings were commenced against said Central Building, petitioner, at the direction of the receiver, brought action in the Superior Court of the State of California, at Los Angeles, seeking to compel said foreclosing trustee to account for certain payments alleged to have been made by the Tooey Corporation, which, if properly credited, would have cured any alleged default on the part of the corporation. That after trial of the cause judgment in favor of the foreclosing trustee was entered, and on subsequent sale of the property title thereto was evested in a committee representing the bondholders. That thereafter your petitioner instituted suit against the Bond Holders Committee, alleging fraud in the acquisition of the property through trustee's sale and praying that sale of the property be set aside and title thereto vested in the receiver for Tooey Corporation. That said action likewise proved unsuccessful, and judgment was entered against plaintiff, who thereupon instituted appeal, which was never prosecuted in the appellate courts.

That in the aforesaid proceedings your petitioner advanced, or secured the advancement on his own credit, of

all necessary expenses, including court costs and attorney's fees. That all of his expenditures, both of time and money were made in an effort to preserve the assets of Tooey Corporation for the benefit of all creditors thereof. In said proceedings petitioner was represented by attorney Edwin J. Miller.

III.

That while petitioner was acting as said receiver's agent he made a full and complete investigation of the affairs of said Tooey Corporation, in the course of which it was also necessary for him to investigate the financial status of Margaret E. Tooey, owner of all of the capital stock of the company. That in the course of this investigation it came to his knowledge that Margaret E. Tooey on the death of her husband had become the owner of certain properties located in the Oklahoma City oil field. After making this discovery petitioner went to Oklahoma, City, where he learned that almost immediately after the filing of the receivership proceedings in the United States District Court at Los Angeles Margaret E. Tooey had transferred her oil properties to one Grant Egbert and his wife for a purported consideration of $7000.00; the same investigation disclosed that after making the conveyance to Grant Egbert and wife Margaret E. Tooey had delivered certain mortgages on the oil property, one of which was to Mazie McLeod, who had been the complainant in the receivership action.

IV.

That petitioner thereupon returned to Los Angeles and in conjunction with Mark Roberts & Company and Equity Building and Loan Association, two other creditors of Tooey Corporation, instituted these involuntary proceed-

ings in bankruptcy in the United States District Court at Los Angeles, against Margaret E. Tooey; that no proceedings were taken immediately in said matter and thereafter, about September of 1931, your petitioner secured the services of Mott, Vallee and Grant and Gilbert B. Hughes to prosecute said bankruptcy proceedings, with the idea of eventually recovering for the creditors of the estate, if possible, the certain oil properties previously conveyed by Mrs. Tooey, which in the meantime had turned out to be of very considerable value.

V.

That petitioner advanced all necessary costs for the prosecution of said bankruptcy proceedings, and after Margaret E. Tooey was adjudicated a bankrupt, and Hubert F. Laugharn appointed trustee of her estate, he was appointed trustee's agent; from that time your petitioner was closely associated with Mott, Vallee and Grant and Gilbert B. Hughes in the prosecution of action on behalf of the trustee against Grant Egbert and wife for the recovery of the oil property, and as trustee's agent made four trips to Oklahoma City, investigating the situation with reference to the litigation. Prior to the adjudication, and while acting as agent for the equity receiver, he had made two trips to Oklahoma City.

VI.

That your petitioner has in no way been reimbursed for the amount of his expenditures or for his services on behalf of the creditors of the above-named bankrupt, although heretofore, on or about February 20, 1933, he filed claim herein for $3856.79 for his expenditures and services to said date, payment of which from any moneys accruing to them from the above estate, was approved by

the following named creditors, to-wit: Mazie McLeod, E. H. Martin, Mark Roberts & Co., Inc., Equity Building & Loan Association and J. C. Aldrich, as shown on the face of the instrument or claim filed herein by petitioner on February 20, 1933, as aforesaid, a true copy of which is hereto attached, marked "Exhibit A".

That on July 6, 1931 the involuntary petition was filed herein, and on August 26, 1932 an order of adjudication was made herein, after contest; that during the said period of time your petitioner, upon behalf of all creditors generally and in the furtherance of the said involuntary proceedings expended certain sums for the purpose of securing evidence, interviewing witnesses, securing information and data, making trips to Oklahoma, etc., in the sum of $2,073.85 which said disbursements are included in the total of Exhibit "A", but which are itemized and set forth in Exhibit "B" hereto attached and made a part hereof.

VII.

Petitioner alleges that from August 26, 1932, the date of adjudication herein, until the present time, petitioner has rendered further services herein and has expended further sums of money in the administration of the estate, assistance in the trial of the plenary suit to recover the interest in the oil wells, securing of statements and data, trips to Oklahoma City, etc., and in this connection your petitioner has expended the sum of $1,434.71 for the benefit of the administration of the estate. Said disbursements made by petitioner since the date of adjudication are set forth in detail in Exhibit "C" hereto attached and made a part hereof. Your petitioner alleges that the same are proper charges of administration in this

estate and that petitioner should be repaid and reimbursed the said sum.

VIII.

That since the filing of the involuntary petition herein to the present time your petitioner, in furtherance of said petition and as trustee's agent subsequent to adjudication, has performed services herein for which no compensation has at any time been made him; that said services have consisted of investigation work both in California and in Oklahoma, and have required the time and attention of petitioner off and on since the filing of the involuntary petition.

Among other things such services have included since said date four trips to Oklahoma; that said services and the time consumed therein are in part more fully reflected in Exhibit "D" hereto attached and made a part hereof; that the reasonable value of said services is in the sum of $1,490.00.

WHEREFORE your petitioner prays:

1. That he be repaid the sum of $1,434.71 on account of costs advanced herein in assisting in the administration of the estate, trial of the plenary action, trips to Oklahoma City, etc., all as more specifically set forth in Exhibit "C" attached hereto;

2. That he be paid herein from the estate, compensation in the sum of $1490.00 for his services from the date of the filing of the involuntary petition to the present date;

3. That an order be made herein directing the trustee to deduct from any dividends hereafter accruing to those creditors referred to in Exhibit "A" hereto attached their

pro-rata share of the sum of $3856.79, payment of which to petitioner was consented to by them, and further directing said trustee to pay said amount to petitioner in accordance with the provisions of said Exhibit "A".

DAN BOONE
(Dan Boone)
Petitioner.

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

DAN BOONE, being by me first duly sworn, deposes and says: that he is the petitioner named in the within petition; that he has read the foregoing petition for allowance on account of expenditures and services in behalf of bankrupt estate, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Dan Boone

Subscribed and sworn to before me this 22nd day of March, 1935.

[Seal] Katherine Spengler
Notary Public in and for the County of Los Angeles, State of California.

[For Exhibit A see "Costs of Litigation for the Benefit of all Creditors of the Tooey Corporation, and Margaret E. Tooey, Bankrupt" which is incorporated in the Condensed Statement of Evidence in Narrative Form.]

EXHIBIT "B"

BANKRUPTCY PETITION FILED AGAINST MARGARET E. TOOEY J*Y*LY 6th, 1931

COSTS AND EXPENSES PAID BY DAN BOONE FOR THE BENEFIT OF ALL CREDITORS. AS FOLLOWS:

32	#16976C. Filing costs Bankruptcy Pet*t*ition	7/6/31	$ 30.00
33	U. S. Marshal*l*s fee service on Mrs. Tooey	7/6/31	3.00
34	" " " " " defendants	7/6/31	10.00
35	S. R. Harrington Atty. costs Ppr. Pet*t*ition	7/6/31	10.00
36	Notarys fees creditors signatures	7/6/31	1.50
37	U. S. Marshal*l* fee service etc.	8/4/31	10.00
38	H. K. Sarjent copying of notices	8/8/31	2.50
39	Stenographic fees (copies pet*t*ition)	8/8/31	1.00
40	S. R. Harrington Attys fees (balance)	8/10/31	75.00
41	Misc. costs Dan Boone re: filings etc.	8/12/31	10.00
43	Harrington Attys fees	7/30/31	25.00
44	Harrington " " *lies pendance*	7/25/31	10.00
45	Zimmerman Clerk fil*l*ing costs	7/8/31	7.00
46	Recording *Lies pendance* County Clerk	7/9/31	1.80
47	L. E. Trip Atty. service costs	7/10/31	2.00
	Expenses Boone trip to Oklahoma City:		

49	So. Pacific R. R. fare to Oklahoma City 7/10/31	86.50
50	Pullman ticket #9303 " " "	3.00
51	Baggage checking costs " " "	.50
52	Pullman ticket #32088 " " "	6.00
53	Baggage check " "	.50
54	Pullman ticket #2117 " "	4.50
55	Baggage check " "	.50
56	Pullman ticket #4349 " "	3.00
57	Baggage check " "	,50
58	Pullman ticket #7152 " "	7.20
59	Bus fare: Tulsa, Ponca City, Brookfield Mo. etc.	28.50
60	Meals Boone, and misc. expense 22 days at 3.00	66.00
61	Legal fees Durfee and stenographic costs, Okla.	32.50
62	Records, copies, certifications of mortgages, copies.	17.50
63	Myers Photo Shop, photogra*ps* of wells and copies	9.25
64	Hotel bill Black Hotel Oklahoma City	2.50
65	" " Bliss Hotel Tulsa Oklahoma	4.00

66	Whitcomb Hotel bill		3.00
67	Carolyn Hotel bill		2.50
68	Little Hotel Salt Lake City		2.00
69	Denver Hotel bill Denver Colorado		2.50
70	Misc. expenses telegrams etc.		6.50
71	Hotel Golden bill		3.00
72	Hotel Fort Worth bill		3.00
73	Hotel Houston bill		2.50
74	Hotel Broadview, Kansas City (Witchita)		3.00
75	Hotel Galveston bill		2.50
77	D. D. Service copying of Tooey Audit Los Angeles		10.00
78	Trip and expenses Oklahoma City Dan Boone	10/10/31	100.00
79	" " " (van Landingham) " "	10/11/31	125.00
80	Bankruptcy pettition costs " "	6/6/31	16.50
81	Trip and expenses Boone Oklahoma City	10/10/31	125.00

Sheet No. 1

Costs continued sheet no. 2.

SHEET NO 2

Costs Continued

82 Trip by Boone to Carmel,
And Paso Robles (2) 7 days—75.00— 6/10/31
train fare and misc expenses
Hotels etc.

No.	Item	Days	Amount	Date
83	Boone trip acct. Mark Roberts. Carmel etc.	7 days	62.00—	9/20/31
84	Boone trip to Paso Robles Re: incumbrances	3 "	38.00—	11/19/31
85	Bond premium on injunction bond to H. Devlin Co.		25.00	2/25/32
86	Filing fee Mark Roberts Co.		5.00	3/24/32
87	Trial costs, Tooey for all creditors		75.00	8/16/32
88	Gilbert B. Hughes Atty. advance by Boone		30.00	3/24/32
	Expenses Boone to Oklahoma City			
89	Expenses R. R. Fare, Hotels, and Misc costs		350.00	10/7/32
90	R. B. Turnbull costs, of notice to creditors		17.70	10/31/32
91	Boone expense to Paso Robles 3 days		30.00	12/7/32
92	Telegram to Atty. John Durfee Tulsa Oklahoma		1.60	12/7/32
	Expense Boone to Oklahoma City;			
93	Expense total R. R. Fare Hotels etc.		300.00	12/13/32
97	Bond premium to Fidelity Co. injunction bond		50.00	5/4/33
100	Boone expense to Oklahoma City		125.00	5/12/33
101	Boone misc. expense Oklahoma City		10.00	6/23/33
125	Telegram L. A. to Durfee Atty Oklahoma City		1.30	6/23/33
	Totals		$2073.85	

EXHIBIT C

Costs paid by Dan Boone for the benefit of all creditors, of Margaret E. Tooey Bankrupt from the date of her adjudication in bankruptcy—Aug. 26, 1932

Monies paid as follows:

No.	Item	Date	Amount
94	Expense wired by Boone to Durfee for costs to Oklahoma City	1/8/33	$ 20.00
95	Dr. F. S. Barnard telegrams, and misc. expenses	1/8/33	10.00
96	Expense Boone trip to Paso Robles regarding settlement of Tooey Vs. Egbert	2/3/33	20.00
98	Boone expense R. R. Fare, Hotel, etc. Oklahoma at direction of Hubert F. Laugharn trustte to check monies impounded, to serve orders on all oil companies of pending littigations etc. to check records, get copies of incumbrances	5/5/33	250.00
99	Dr. Barnard telegrams and money orders to Boone	5/4/33	10.00
102	Notary fees, stenographic, and telegrams to Dr. Barnard Paso Robles, re: settlement	6/23/33	10.00
103	Copy of transcript of Mrs. Tooey for trial	6/30/33	20.00
104	Money paid to Kenneth Grant attorney for transmission to Attorney Durfee at Tulsa	8/24/33	50.00

105	Expenses of Boone to two trips to Carmel and Paso Robles, Re: case Tooey Vs. Egbert	9/1-9/18/33	85.00
106	Expenses of Mark Roberts Co. Re: littigation	11/21/33	70.00
107	Bond premium paid by Boone to Hartley Devlin Co. on $5,000.00 injunction bond. Oklahoma	11/25/33	12.50
108	U. S. Marshall filing fees pd. by Boone	11/27/33	6.80
109	Hartley Devlin Co. Bond premium paid	12/7/33	12.50
110	Mark Roberts expense and Costs	12/12/33	15.00
111	Boone expense to carmel and Paso Robles (2)	12/16/33	50.00
112	U. S. Marshall Service on Mrs. Tooey at Paso Robles for appearance " VS. Egbert	18/18/33	20.00
113	Tooey transcript for trial by Hughes (Boone)	1/30/34	44.85
114	Tooey Vs. Egbert reporters costs, etc.	12/29/33	15.00
115	Two trips by Boone to Paso Robles to get releases from Dr. Tape and Mrs. Tape 8 days	3/30/34	85.00
116	U. S. Marshall service on Mrs. Tooey Paso Robls	4/6/34	19.75
117	" " " " " " balance	4/10/34	5.80

118	Paid to Turnbulls Court Re; Laugharn Vs. Grant Egbert costs, Pd. by Boone	5/7/34	56.25
119	Costs Turnbulls Court Laugharn Vs. Egbert	5/8/34	56.25
120	Witness fees McBurney above trial 2 days	5/7-5/8/34	5.00
121	Witness fees paid to Sarjent for Mrs. Tooey	5/7-5/8/34	10.00
122	Boone trip to Paso Robles deeds from Dr. Tape	7/19/34	25.00
123	Boone trip to Paso Robles deeds from Mrs. Tape	11/10/34	35.00
			1,019.70

Costs Continued:

124	Atty. C. E. Spencer Equity Bldg. Loan paid		25.00
125	Trip to Oklahoma City at direction of Laugharn R. R. Fare Oklahoma City, Tulsa, Kansas City, etc.	1/23/35	78.17
126	Return trip Boone Oklahoma to Los Angeles,	2/18/35	78.17
127	Certifications of notaries etc. deeds	1/18/34	1.50
128	Misc. expense Boone Bliss Hotel Oklahoma	1/28/35	1.60

129	Pullman Los Angeles, to Oklahoma to Kansas City	14.60
130	" Oklahoma, Kansas City to Los Angeles,	14.60
131	Hotels room rent of Boone on trip 20 days at 2.00	40.00
132	Stamps and registered letters by Boone	.25
133	Maps and photos of oil properties Oklahoma (Myers)	4.00
134	Expense monies given by Boone to Atty. Dufee for title search and misc. expenses at Tulsa Oklahoma	74.40

Continued: sheet No 2

Expense of Boone to Oklahoma

Costs Continued Sheet No. 2

135	Boone telephone long distance from Oklahoma City to Los Angeles, to Kenneth Grant attorney	4.30
136	Telegram Boone from Oklahoma City to Los Angeles	.95
137	Stenographic expense at Oklahoma City Re; release of all impounded monies held by companies there	7.00

138	Telegram to Los Angeles, from Oklahoma City	.95
139	Bus fare Boone Bartlesville to Brookfield Mo	4.25
140	" " " Brookfield to Bartlesville Okla	4.25
141	Telegram Brookfield to Los Angeles (night letter)	1.32
142	Misc. expense Boone en route and at Brookfield	3.00
143	Notary fees and certifications Oklahoma	1.00
144	Notarys fees on re conveyance McLeod	1.25
145	Re conveyance deeds Mrs. Tape and stenographic.	1.00
146	Misc. expense Boone Tulsa Hotel	2.25
147	Meals Dan Boone en route etc. At 2.00 per day	50.00
148	Telegram Boone to Durfee at Tulsa Oklahoma City	1.20
		415.01

Totals expense sheet No 1	$1,019.70
Totals " " " 2	415.01
Grand total	1,434.71

[EXHIBIT D]

LABOR OF DAN BOONE TRUSTEES AGENT, APPOINTED BY HUBERT F. LAUGHARN TRUSTEE OF MARGARET E. TOOEY BANKRUPT.

THE ITEMS OF LABOR FOR DAN BOONE LISTED BELOW IS ONLY FOR ACTUAL TIME SPENT ON THE VARIOUS TRIPS. AND NO TIME IS FIGURED FOR ALL COURT APPEARANCES, CONFERENCES WITH ATTORNEYS OF THE CREDITORS, MISC. LABOR INVESTIGATIONS FOR MR. LAUGHARN AND OR FOR THE ATTORNEYS FOR INVESTIGATIONS FOR A PERIOD OF FROM THE DATE OF THE FILING OF THE INVOLUNTARY PETITION AGAINST MRS. TOOEY FROM JULY 6th. 1931 TO THE PRESENT TIME OF MARCH 21st. 1935 IN ACTUAL TIME SPENT OVER A PERIOD OF FOUR YEARS BY DAN BOONE FOR THE BENEFIT OF ALL CREDITORS THE AMOUNT OF COMPENSATION IS ACTUALLY AN AVERAGE OF $370.00 PER YEAR FOR LABOR OF DAN BOONE FOR THREE YEARS—AS TRUSTEES AGENT.

A.	Labor Dan Boone filing involuntary pettition	1 day at 10.	$ 10.00
B.	42 " " " 9/10/31 to 9/18/31	7 " " 10.	70.00
C.	48 " " " 7/9/31 to 7/11/31	2 " " 10.	20.00
D.	76 " " " 7/13/31 T Oklahoma	22 " " 10.	220.00

E.	"	"	"	Carmel, Paso Robles, Trials etc.	26	"	"	10.	260.00
F.	"	"	"	to Oklahoma City 10/10/31 to	22	"	"	10.	220.00
G.	"	"	"	Trip to Carmel etc. 6/10/31 "	7	"	"	10.	70.00
H.	"	"	"	" " " 9/20/31 "	7	"	"	10.	70.00
I.	"	"	"	" Paso Robles 11/19/31 "	3	"	"	10.	30.00
J.	"	"	"	" Oklahoma City 10/7/32 "	25	"	"	10.	250.00
K.	"	"	"	" Paso Robles 12/7/32 "	3	"	"	10.	30.00
L.	"	"	"	" Oklahoma City 12/13/32 "	23	"	"	10.	230.00
M.	"	"	"	" Trial Turnbull court					
				Tooey Vs. Egbert	1	"	"	10.	10.00
								Totals	1,490.00
								[In ink]:	520 00/xx

[Endorsed]: Filed Mar 22 1935 at 10 Min. past 4 o'clock P.M. Rupert B. Turnbull, Referee C. M. Commins Clerk CD Filed R. S. Zimmerman, Clerk, at 25 min. past 1 o'clock. Dec. 28, 1935 P. M. By F. Betz, Deputy Clerk.

[Title of Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER.

TO THE HON. RUPERT B. TURNBULL, REFEREE IN BANKRUPTCY:

Your petitioners, Mazie McLeod, and Edwin J. Miller, as assignee of Edward H. Martin, respectfully show the following:

I

That they are creditors of Margaret E. Tooey, the above named bankrupt, and that their respective claims have been allowed herein in the following amounts:

The claim of Mazie McLeod,	$ 9,225.60
The claim of Edwin J. Miller, as assignee of E. H. Martin,	$ 8,098.34

and orders of allowance have heretofore been entered herein accordingly.

II

That in the course of the proceedings in the above entitled bankrupt estate, to-wit, on the 11th day of June, 1935, an order of adjudication and subrogation giving certain moneys from said claims, and giving same to Dan Boone, copy of which is hereto annexed, and by reference made a part hereof, was made and entered herein by the Hon. Rupert B. Trumbull, referee.

III

That such order was and is erroneous, and in excess of the jurisdiction of this court and of this referee, and without authority of law in the following respects:

1. That there was and is no consideration of any kind or character for the alleged subrogation agreement (it being for alleged past expenditures of Dan Boone) which

formed a basis of the said order of the referee, and the same is invalid and unenforcible.

2. That the said alleged subrogation contract was never completed nor delivered for the purpose of becoming effective, to Dan Boone, but was handed to said Dan Boone by Edwin J. Miller conditionally, and for the purpose of obtaining the signature thereon of all the remainder of the creditors whose claims were filed against the estate of Margaret E. Tooey, bankrupt, and not otherwise; said signatures of said remaining creditors were only in part obtained; and a large part thereof were never obtained; and said contract never became binding.

3. That the claim of $3856.79, being the basis of said supposed subrogation agreement was not a proper claim against said bankrupt estate, and has been disallowed by the referee; and the referee had no jurisdiction to do anything further about the same, nor to order any subrogation, nor to adjudicate thereon, it not being a part of the administration of the said bankrupt estate.

4. That the said $3856.79 is, in a large part thereof, a duplication of other claims in favor of Dan Boone, which other claims have been allowed in whole or in part; and therefore invalid.

5. That the only consideration for the signing of the said subrogation agreement by the said Edwin J. Miller was the promise on the part of Dan Boone to said Miller that if he, the said Edwin J. Miller, would sign the same for the two creditors, viz., himself and Mazie McLeod, that he, the said Dan Boone would obtain the signatures of all other creditors of said estate thereto; said Miller relied on said promise, and because thereof signed same, and would not have signed same except for said promise; said signatures were not obtained, and said instrument never became effective nor binding.

6. That the claim of $3856.79, and the items composing the same, and designated as costs and attorney's fees, are uncertain and unintelligible and ambiguous, and their validity is denied, and the same never was adjudicated by this court, nor any other court, and this court had no jurisdiction to adjudicate the same; and said order of June 11, 1935, is therefore erroneous; is in excess of the jurisdiction of this court and is void.

7. That the power of attorney giving Edwin J. Miller the power to represent Mazie McLeod in and about the allowance of her claim, gave no power or authority to give away her claim, or any part thereof; and the referee misconstrued the said power of attorney and said allowance is without authority of law or fact.

8. That Dan Boone represented that all creditors of said Margaret Tooey would sign said agreement if said Miller would do so; and stated that he, himself, represented practically all of said creditors whose claims were filed against said estate, and that all would sign same; that the claim of H. W. Ringle was represented by Mr. Grant, the attorney for said Boone, and that if said Miller would sign same for his clients, said Grant would sign same for said Ringle, and said Miller believed said representation and signed same, and except for his belief of said statements he would not have signed same; and said Grant, as attorney for said Ringle, did not sign, nor did said Ringle sign, and many of the other creditors promised by the said Dan Boone whose names would be signed to the same, did not sign; therefore, because of all of said defects; and because of said want of consideration; and of want of delivery; and because of the lack of jurisdiction of this court to make said order, and

because same is a disputed claim and invalid; these petitioners pray that the said order be reviewed and reversed and set aside, and said alleged subrogation proceeding be dismissed for want of jurisdiction.

9. That this proceeding is an attempt to enforce an uncompleted and unenforcible promise to make a gift; there is no consideration therefor, and it is unenforcible.

10. That the claim of $3856.79 is based on alleged expenditures of services performed by said Dan Boone before the said bankruptcy proceeding was instituted, and are matters not pertaining to the bankruptcy proceeding; and this court has no jurisdiction to entertain this proceeeding or adjudicate concerning the same.

11. That all evidence heard on said objections be transcribed and certified with this petition to the reviewing court.

WHEREFORE, your petitioners, feeling aggrieved because of such order, pray that the same may be reviewed as provided in the bankruptcy act of 1898 and of general order XXVII.

Dated: June 19, 1935.

MAZIE McLEOD, Petitioner,
By Edwin J. Miller
Her Attorney.

Edwin J. Miller
Edwin J. Miller, as assignee of
Edward H. Martin, Petitioner.

Filed Jun. 1935, at .... min past 3 o'clock P. M. Rupert B. Turnbull Referee. C. M. Commins Clerk E. B.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 23 min. past 2 o'clock Jun. 24, 1935 P. M. By Theodore Hocke Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF	
MARGARET E. TOOEY,	
Bankrupt.	
———	
	NO. 16976-C
MAZIE McLEOD and EDWIN J. MILLER,	CONDENSED STATEMENT OF EVIDENCE IN NARRATIVE FORM.
Appellants,	
vs.	
DAN BOONE and HUBERT F. LAUGHARN, Trustee,	
Appellees.	

BE IT REMEMBERED That upon the hearing before the HON. RUPERT B. TURNBULL, Referee in Bankruptcy, in the matter of Margaret E. Tooey, bankrupt, relating to the contest of the claim for subrogation in favor of Dan Boone, and against Mazie McLeod and Edwin J. Miller, upon objections to said subrogation of Mazie McLeod and Edwin J. Miller, the following documents and files and verbal testimony were before the Referee, and introduced and considered in evidence, to-wit:

IN THE MATTER OF MARGARET E. TOOEY BANKRUPT

NO. 16976-C

PETITION FOR ALLOWANCE TO CREDITOR TO COVER COSTS AND EXPENSES

TO THE HONORABLE ROBERT B. TURNBULL: REFEREE IN BANKRUPTCY:

THE PETITION OF DAN BOONE RESPECTFULLY SHOWS THAT:

That your petitioner paid the costs of Littigation, etc.

That prior to the filing of the bankruptcy Petition in this matter your petitioner paid and expanded in connection with the filing of several civil suits, against the bankrupt. For the benefit of all creditors.

Evidence of all costs, for labor, and expenses, advanced, (including several trips to Oklahoma) have been approved for payment by the creditors, as evidenced by the attached itemized sums expanded by the petitioner and approved for payment—OUT of the first funds realized into the Estate, and deducted pro-rata from the first funds (dividends) payable on their claims.

The petitioner has not been reimbursed for any of said moneys, so expanded.

Wherefore your petitioner prays that an allowance be made to It for the sum of Three Thousand Eight Hundred and Fifty Six Dollars, and Seventy Nine Cents. ($3,856.79) to cover the sum so expanded.

Dated; February 21, 1933.

Dan Boone
DAN BOONE – PETITIONER.

COSTS OF LITIGATION FOR THE BENEFIT OF ALL CREDITORS OF THE TOOEY CORPORATION, AND MARGARET E. TOOEY, BANKRUPT.

HUBERT F. LAUGHARN, RECEIVER IN EQUITY, FOR TOOEY CORP. AND TRUSTEE FOR MARGARET E. TOOEY, BANKRUPTCY.

DAN BOONE, TRUSTEES, AGENT.

ALL COSTS, ETC. PAID FOR BY DAN-BOONE. TO WIT:

	CASE NO.	ACCOUNTS	TOTALS	CHARGE CREDITOS	CHARGE LABOR BOONE	CHARGE ALL COSTS
	LOBDELL-	MARK ROBERTS CO.	1,793.84	304.64		614.20
	"	" " "		875.00		
	#324342	Quiet Title Action	65.80		20.00	45.80
LAUGHARN	#T. 42. C	McLeod v. Tooey	1,072.14	500.00 bnd	90.00	482.14
LAUGHARN	#T. 42. C	Carmel properties	443.80		260.00	183.80

LAUGHARN	#16976C. Tooey Bankruptcy	223.00		70.00	153.00
LAUGHARN	6/1 to 7/8/31 OKLAHOMA TRIP	563.65		220.00	343.65
LAUGHARN	Nov/18 to 11/18/32 " "	647.70		280.00	367.70
LAUGHARN	Dec. 10 " Jan 20/33 " "	726.50		330.00	396.50
	TOTALS	5,536.43	1,679.64	1,270.00	2,586.79
			1,679.64	Charge Creditors	
			1,270.00	Labor due Boone	
			2,586.79	Costs & Attorneys	
		5,536.43	1,679.64		
			304.64	Chg. Mark Roberts, cost	
			875.00	" " " costs	
			500.00	Credit Bond (cancelled)	
		5,536.43	1,679.64		

1,679.64	All Credits as above
$3856.79	

DUE BOONE FOR LABOR AND ALL COSTS ADVANCED

$3856.79

The undersigned creditors, hereby agree that the above expenses incurred by DAN BOONE in the investigation, trips to Oklahoma, etc., maybe repaid to him out of the first funds realized into the estate, and deducted pro-rata from thefirst dividends payable on our claims.

APPROVED FEBRUARY 20, 1933.

EDWIN J. MILLER – for claims
(for E. H. Martin and Mazie McLeod)

(CORPORATE SEAL)

APPROVED T. S. BARNARD PRESIDENT.
(Mark Roberts & Co. Inc.)

(CORPORATE SEAL)

APPROVED Benj. Westen PRESIDENT
(Equity Bldg. and Loan Asso.)

APPROVED ______________________
(For H. W. Ringle)

APPROVED J. C. ALDRICH
____
(J. C. Aldrich)

APPROVED H. B. Merly, Jr. Cr. Mgr.
____
(Peck and Hill Co.)

APPROVED ______________________

(ON THE BACK)

(FILED)

(Feb. 24 1933)

(at 45 min. past 3 o'clock)
(P. M.
(RUPERT B. TURNBULL, Referee)
(C. M. COMMINS, Clerk)

That on March 23, 1935, the Referee sent a notice to the creditors that there would be a meeting on April 2, 1935, at the office of the Referee, for the following purposes:

(Condensed statement)

1. To hear the trustee's report;
2. To hear application for fees;
3. For the trustee $350.00;
4. For Mott, Vallee & Grant and Hughes, attorneys for petitioning creditors $12,000.00, and 40% interest in the oil property;
5. And to DAn Boone for trustee's agent, $1490.00;
6. To Dan Boone for $1434.71 costs advanced;
7. To Dan Boone for $3856.79 to be deducted from dividends of certain creditors in his petition on Exhibit "A".

RUPERT B. TURNBULL, Referee.

That on or about April 18, 1935, Mazie McLeod and Edwin J. Miller filed objections to the petition asking for subrogation; on May 29, 1935, said objectors filed amended objections to the making of said subrogation; which said amended objections, in condensed form, are as follows:

(United States Court caption omitted)

Mazie McLeod and Edwin J. Miller, as assignee of E. H. Martin, whose claim has been allowed in the sum of $7500.00 principal, with interest, object to the allowance and subrogation in favor of Dan Boone of the pro rata

amount of their costs covering investigation and expenses of litigation, etc., for the following reasons:

1. There is no consideration for the subrogation agreement, and it is unenforcible.

2. That the contract for alleged subrogation was never delivered nor completed; that its delivery to Dan Boone was for the purpose of securing other signatures thereon, which were never obtained, and never became effective; it was agreed that the same would not be binding unless the other signatures were obtained; the paper should be cancelled.

3. A large part of the claim of $3856.79 appears from the face of the claim to be for alleged costs and expenditures incurred before the bankruptcy proceeding, and has been adjudicated not to be a proper claim; and no sufficient consideration for said alleged subrogation agreement.

4. That by order of court, on April 9, 1935, this court allowed Dan Boone for services, as trustee's agent, $520.00; and a further sum and refund of moneys and costs advanced in the administration of the estate in the sum of $1434.71, making a total of $1954.71; that said $1954.71 was based upon the same claims and services and alleged expenditures and expenses as going to the making up in part of $3856.79.

5. That the only consideration for the signing of the said subrogation was a promise on the part of Dan Boone that if Edwin J. Miller would sign for said two creditors that he, Dan Boone, would obtain the signatures of all the other creditors of the bankrupt estate of Margaret E. Tooey thereto; and if such signatures were not obtained that the document would not be binding; that said signa-

tures were never obtained, and the consideration has wholly failed.

6. That the alleged attorney's fees, forming a part of the $3856.79 are not proper charges to be repaid to Dan Boone.

7. That the items making up the $3856.79 are uncertain, unintelligible and ambiguous.

8. That the items making up the $3856.79, and noted in said claim as $1270.00 labor due, is included in other items of other claims allowed to Dan Boone.

9. That the items making up the $3856.79, and listed as charged credits in the amount of $1679.64 is not proper, is uncertain, ambiguous, unintelligible and improper.

10. That the claim for $3856.79 is a duplication in part of claims already allowed.

11. That the subrogation agreement was presented by Dan Boone to Edwin J. Miller at his office when the said Miller was busy with other matters, and Boone represented to Miller that he spent a large amount of his own money, and wanted to be repaid out of the first moneys that were available; the said Miller merely glanced at the paper, and did not analyze it, nor inquire as to the basis of the several charges therein, and did not read all of the same; but inquired of the said Dan Boone if all the creditors were going to sign, including the claim of H. W. Ringle; Dan Boone represented that all were going to sign it, and that he, Dan Boone, represented almost all the creditors, and that all would sign. Said Miller replied that he had no authority from his client, Mazie McLeod, to sign it; but that if all the other creditors were

going to sign that he, the said Miller, would sign without authority from his client; and that if all the creditors did not sign the subrogation agreement it would not be binding on the creditors represented by said Miller; the said Dan Boone said that if all did not sign that it would not be binding; said Miller thereupon signed the same. That in a conversation within the last three weeks the said Dan Boone stated to the said Miller that the above was correct, and that Mr. Grant had promised to sign for the Ringle claim, and had not done so; that said Miller told the said Boone that he would not be bound thereby unless all creditors joined therein. That said Miller relied upon said statement, and would not have signed except for said promises; that all the creditors have not signed the same, and the said H. W. Ringle has not signed; and the undersigned notified the said Boone that he would not be bound thereby.

12. The said Boone, shortly after the commencement of the bankruptcy proceeding, offered said Miller the representation of the petitioners in the bankruptcy proceeding, which said Miller declined because he was attorney for Mazie McLeod.

That said Miller did not know there would ever be any claim for liability under said subrogation document, until March, 1935, when he received the notice from the referee. He therefore objects to the order of subrogation.

EDWIN J. MILLER
Attorney for Mazie McLeod and
Per Se.

That after the conclusion of said hearing on the subrogation, and under date of June 11, 1935, the Referee made an order of subrogation in words and figures as follows: (omitting caption)

ORDER SUBROGATING CLAIMS OF EDWIN J. MILLER, ASSIGNEE OF E. H. MARTIN, MAZIE McLEOD, MARK ROBERTS & CO., EQUITY BUILDING & LOAN ASSOCATION, PECK & HILLS AND YOUNGER & FELLOWS, AND ANY AND ALL DIVIDENDS THEREON, TO CLAIM OF DAN BOONE IN THE AMOUNT OF $3621.79.

WHEREAS, heretofore, on or about February 20, 1933, Dan Boone filed herein claim against the above estate in the sum of $3856.79 on account of his services and expenditures in the protection of the assets of the above named bankrupt prior to bankruptcy and in the administration of the estate subsequent thereto, said claim bearing on its face the agreement of certain creditors of the above entitled estate that the said amount claimed by Dan Boone should be deducted pro rata from the first dividends payable on account of their claims herein; and

WHEREAS, the creditors so agreeing that dividends on their claims herein might be charged in favor of said Dan Boone to the extent of $3856.79 are:

1. Edwin J. Miller, assignee of E. H. Martin
2. Mazie McLeod
3. Mark Roberts & Co.
4. Equity Building & Loan Association
5. Dan Boone, assignee of J. C. Aldrich
6. Dan Boone, assignee of Peck & Hills
7. Dan Boone, assignee of Younger & Fellows; and

WHEREAS, on the 15th day of April, 1935 notice was duly directed by the above entitled court to each of said creditors directing attention to their assignment to Dan Boone as aforesaid and notifying them that unless objections were filed within ten days from the date of said notice an order would be made subrogating their claims; and each of them, to the charge in favor of said Dan Boone, pro rata; and

WHEREAS, no objections to said subrogation were filed other than by Edwin J. Miller, assignee of E. H. Martin, and by Mazie McLeod; and

WHEREAS, the matter of the objections of said creditors to said subrogation came on regularly for hearing before the Honorable Rupert B. Turnbull, Referee in Bankruptcy, on the 4th day of June, 1935, said objecting parties appearing by their attorney, Edwin J. Miller, Esq., and at said times the referee heard evidence in support of and in opposition to said objections, and being now fully advised in the premises:

IT IS HEREBY ORDERED:

That the claims herein of the following named creditors, to-wit:

Edwin J. Miller, assignee of E. H. Martin

Mazie McLeod

Mark Roberts & Co., a corporation

Equity Building & Loan Association, a corporation

Dan Boone, assignee of J. C. Aldrich

Dan Boone, assignee of Peck & Hills, and

Dan Boone, assignee of Younger & Fellows, be, and hereby are, subrogated and subjected to a charge and assignment in favor of Dan Boone in the aggregate amount of $3621.79 (being the aforesaid $3856.79 less $235.00 heretofore paid to said Dan Boone), and the trustee herein is hereby ordered and directed to pro rate said sum of $3621.79 against said crditors, Edwin J. Miller, assignee of E. H. Martin, Mazie McLeod, Mark Roberts & Co., Equity Building & Loan Association, Dan Boone, assignee of J. C. Aldrich, Dan Boone, assignee of Peck & Hills, and Dan Boone, assignee of Younger & Fellows, in proportion as the claim of each, allowed or hereafter allowed, bears to the aggregate of their claims, and to deduct said pro rata from the first dividends accruing herein to said creditors, and each of them, and to pay the same to the aforesaid Dan Boone until said amount of $3621.79 has been paid in full.

Dated: Los Angeles, California, June 11, 1935.

RUPERT B. TURNBULL
(Rupert B. Turnbull)
Referee in Bankruptcy

STATEMENT OF VERBAL EVIDENCE IN NARRATIVE FORM.

HEARING ON APRIL 30, 1935.

Be it remembered that upon a hearing before the Hon. Rupert B. Turnbull, Referee, in the Matter of Margaret E. Tooey, Bankrupt, relating to the subrogation of Dan Boone to the claims of Mazie McLeod and Edwin J. Miller, there appeared for the petitioner Dan Boone attorneys Kenneth E. Grant, of the firm of Mott, Vallee & Grant, and Gilbert B. Hughes. There appeared for the objectors, Edwin J. Miller.

The following proceedings occurred on April 30, 1935, at ten o'clock A. M.:

It was ordered by the Referee that the matter could not be heard on this date, and that he would set a new date and notify the parties by telephone.

HEARING ON MAY 9, 1935.

MR. GRANT: May I take up first two other matters? I would like first to take up the matter of the subrogation of Dan Boone's claim of $3800.00 on account of monies advanced by him in the administration of this estate and which certain of the creditors agreed should be charged against their dividends. Notices have gone out and the only objections that have been filed by those creditors who signed the instrument and agreed that they would stand their prorata—

THE REFEREE: If they have signed the instrument, that is too bad for them. I am not going to take it away from Mr. Boone if they gave it to him.

MR. GRANT: The only one that has objected is Mr. Miller.

THE REFEREE: Is he here?

MR. GRANT: No, but he himself personally signed the instrument

THE REFEREE: That is disposed of right now. If he wrote his own ticket I can't change it and don't intend to. That is on the calendar regularly here today?

MR. GRANT: Yes.

HEARING ON MAY 14, 1935; TWO O'CLOCK P. M. SESSION.

THE REFEREE: Margaret E. Tooey. Mr. Miller asked me to continue this until he could get here. He is here now. Objection to the claim of Dan Boone and objection to the claim of—allowance of a subrogation of Dan Boone in the prorata share of the claim of Edwin J. Miller, E. H. Martin, attorney for Mazie McLeod. The statement has been made in your absence, Mr. Miller, that your signature is the original signature on the Boone contract by which you consent that certain expenses be taken out of your share of the dividends.

MR. MILLER: Well, that oughtn't to have been made in my absence.

THE REFEREE: I am repeating it to you, that that was your signature on that contract.

MR. MILLER: I signed some paper, yes, I have no doubt.

THE REFEREE: Then what objection have you got now to the subrogation of it?

MR. MILLER: The objection is this, that I signed that paper with the understanding that all the creditors were consenting to the same thing.

THE REFEREE: IT doesn't say so.

MR. MILLER: Perhaps it doesn't. I didn't even read it at the time.

THE REFEREE: I can have a layman tell me that but I didn't know lawyers ever did it.

MR. MILLER: Lawyers are worse than laymen, and of course I wouldn't have consented out of certain claims—

THE REFEREE: I don't know what you would have done but I know you did it. There it is. You wrote your own ticket, didn't you?

MR. MILLER: I know—

THE REFEREE: I didn't write it.

MR. MILLER: Sure, I didn't ask anybody else to write my name for me.

THE REFEREE: You made a deal with Mr. Boone that if he put up a certain amount of money you fellows would pay it back. He has now got the money and now you say you didn't read the contract. Is that it? I'm not trying to make fun of you, Mr. Miller. I am laughing at you because lawyers are the worst business men in the world.

MR. MILLER: Another lawyer came into my office last Saturday and got ten dollars and said he would pay it back yesterday and I haven't seen him yet.

MR. GRANT: That is brotherly love.

THE REFEREE: We won't charge that to maladministration.

MR. MILLER: As I said, if Your Honor please, I don't think Mr. Boone ought to expect that this be paid out of one claim to the benefit of other claims. It wasn't our understanding that it would or should be done, and

I have the distinct understanding with him, my friend Grant and his asssociate here—

MR. GRANT: Not with me. I don't know anything about it.

MR. MILLER: I didn't have it with you. I don't charge you with anything wrong here but I did have the understanding that the other claimants would consent and were consenting the same as I did and I was just good enough to sign before the others did, that is all there is to it.

THE REFEREE: That is not what it says. It says that the undersigned creditors will pay out of their share the amount of money he put up. You are not bound to pay him the money until he gets it. He did put up some money, we all know that.

MR. MILLER: That has been a long time ago, a year ago. I am perfectly friendly to Mr. Boone's claim but I don't want to pay him out of my client's money without the others. It was my understanding they were all doing it and that is the reason I signed it.

THE REFEREE: That is not what your contract calls for, though. You are asking me to read something into the contract that you didn't put there.

MR. MILLER: I sure had no authority from anybody I represented and didn't consult anybody about it and didn't think I was prejudicing anybody's claim other than—

THE REFEREE: Of course, part of this expense he is getting back direct from the estate.

MR. MILLER: I have no objection to him getting it all back that way.

THE REFEREE: But part of it I can't do that way.

(Testimony of Edwin J. Miller)

MR. MILLER: What part of it is it you want me to pay?

THE REFEREE: I don't want you to pay him anything. I have a contract directing my trustee to pay him certain money and this is an order to show cause why we shouldn't pay it to him.

MR. MILLER: I have told you why, and if necessary I will swear to it, and he told me he would get all of them, and Mr. Grant was to sign the same as I did.

THE REFEREE: If he had gotten all of them he would have gotten all his money, but that is why he won't get but part of it. Are we in any better position to proceed now than we were last week on these objections?

MR. GRANT: I think so.

The court thereupon adjourned the hearing until May 27, 1935.

EDWIN J. MILLER,

BEING DULY SWORN, TESTIFIED AS FOLLOWS:

MR. MILLER: I am objecting to Mr. Boone's claim—

THE REFEREE: Right now this is the question of subrogation and you have heretofore testified and also admitted that the subrogation agreement bears your signature but you didn't read it.

MR. MILLER: Well, if I read it—I signed it on this statement by Mr. Boone. There is no question about it—

THE REFEREE: I don't think you have any right to change that contract by reason of any words in it. Do you think so, counsel?

MR. GRANT: No.

THE REFEREE: I make that objection because you are acting as your own counsel. Here is an instrument that recites on its face that he is putting up certain money and you consent that a certain amount of your dividend be used to pay him back. Now, do you think you can attack that by saying something else should have been in that agreement, after he has expended his money?

MR. MILLER: No, but the statements that were made induced the signing of it.

THE REFEREE: Go ahead and counsel can protect himself by the necessary objections, if he thinks he has any. I won't raise any more.

MR. MILLER: Mr. Boone came to me when I was busy on other matters, and my recollection is—

MR. GRANT: IS this the conversation at the time of the signing of this instrument?

MR. MILLER: Yes.

MR. GRANT: I object to it.

THE REFEREE: Sustained, especially in view of the fact that the evidence shows that Mr. Boone relied on it and paid out his money.

MR. MILLER: That is not a fact, Your Honor.

THE REFEREE: The evidence shows he did. He advanced a lot of money.

MR. MILLER: That is not my understanding of it at all. The money was paid out before, Your Honor, and the representation that induced me to sign it—

MR. GRANT: Just a moment, please.

THE REFEREE: I have sustained the objection on the ground it is a violation of the parol evidence rule.

MR. MILLER: Will you let me produce authority on that, Judge?

THE REFEREE: I think it is very plain that if I write you a promissory note today in which I say ten days after date I promise to pay Mr. Miller a thousand dollars, after the ten days is up I can't come back and say I should have put the word "not" in here.

MR. MILLER: But I want to produce authority. That is fair.

THE REFEREE: It may be fair according to your idea. We heard this whole matter once and listened to your argument and I decided the thing against you and this morning you tell me you didn't understand I was deciding it and I have reopened it. I want the evidence and the argument now.

MR. MILLER: I am thoroughly convinced I am correct on this, and there is no rights of innocent third parties here. It is the original parties, and it is always competent then to show representations under which it is signed.

THE REFEREE: Not in the absence of an ambiguity or fraud, and there is no ambiguity under this contract and no fraud alleged and there never has been any alleged.

(Testimony of Edwin J. Miller)

MR. MILLER: That is what I am trying to tell you now.

MR. GRANT: I think it is very much of a—

THE REFEREE: There is no fraud in issue here.

MR. MILLER: Yes, I don't call it fraud but—

THE REFEREE: You don't set it up here.

MR. MILLER: I set it up in the objection, that it was obtained under misrepresentation that all creditors' claims would sign.

THE REFEREE: It must be false and known to be false and must have been used as a matter of inducement and must have been relied upon and you must have believed it and you must have acted upon it to your detriment.

MR. MILLER: I propose to show that if you will let me.

THE REFEREE: Where is the pleading that will permit any such proof?

MR. MILLER: IF the objections are not as full as you want them I will re-draw them.

THE REFEREE: I think I am being imposed on but I won't take any snap judgment. Now, you say there is a lot of proof you want to put in that is not in the pleadings. Before you—whatever you put in your pleadings you will have to stand by. I still think you are thinking up a lot of new ones.

MR. MILLER: I am not changing here at all. I am not changing my position at all.

THE REFEREE: I will give you a week. I think you will have to directly charge Mr. Boone with some-

thing that will allow me to waive the parol evidence rule. If I sue you on a promissory note and say, here is the note and you haven't paid it, can you come in and show anything you want?

MR. MILLER: I can show the circumstances under which it is signed. If it is wrongfully obtained, I can always show it.

MR. GRANT: He made the first statement in court that he had no doubt Mr. Boone was entitled to that money.

MR. MILLER: I am not objecting to his claim, and never have. I have always been friendly with Dan Boone and want him to have what is right here but I don't want flesh made out of one and fowl out of the other.

THE REFEREE: I hold no brief for Mr. Boone. He has made more trouble in this case than all the rest of the creditors put together.

MR. GRANT: But he got us a couple of oil wells.

THE REFEREE: But I still have to be as patient as I can. I want it in a pleading.

MR. MILLER: You can give me a week to file that and then I will—it will go over until June 4th;

THE REFEREE: June 4 at two o'clock.

MR. MILLER: That is alright, Your Honor.

THE REFEREE: Will you file that pleading so counsel will be appraised of it at least two days before the hearing?

MR. MILLER: Yes, I can do that your Honor.

HEARING ON JUNE 4, 1935.

TESTIMONY OF EDWIN J. MILLER.

Request is made for the subrogation agreement. It starts out thirty-eight hundred and some odd dollars—that was presented to me at that time with the statement Mr. Boone had been out his money a long time, and there would be money coming from the estate, and he wanted to be paid first. I wanted to get the consent of all other creditors. I asked if the other creditors were going to consent. He said yes. I said I am willing for you to have your money first. I didn't go over the matter in detail. I asked if all the others were going to sign, and he said they were. I said, "If they are I will too."

THE REFEREE: You did have authority because you had a power of attorney?

MR. MILLER: For myself it was different, but for Mrs. Mc*Cloud*—

THE REFEREE: Your power of attorney for Mrs. Mc*Cloud* gave you that right?

MR. MILLER: I don't think that power of attorney would—

MR. HUGHES: There is a letter there advising him to use his own judgment any way he sees fit.

Mr. Hughes offers the letter in evidence.

MR. MILLER: It is the signature of Mr. Burns, I take it.

MR. HUGHES: He is the associate counsel in Missouri?

MR. MILLER: Yes.

THE REFEREE: Trustee's Exhibit A.

(Testimony of Edwin J. Miller)

MR. MILLER: Then I told Mr. Boone—asked him if they were all going to sign, and especially mentioned if the creditor H. W. Ranger (Ringle) was going to sign. He said Ranger (Ringle) was going to sign, and all of the others. I said, "If they are all going to sign, I will sign, but if they don't sign, it isn't going to be binding on me." He said, "No." So I handed it back to him for the purpose of getting *over* signatures, and in the meantime it was not binding on me. It was never delivered, in fact, and was not to be binding. There was no consideration. That is about all the statement I wanted to make. I was sworn on a former occasion.

THE REFEREE: I think I have your side of it pretty well.

MR. HUGHES: Do you wish some cross examination, your Honor?

THE REFEREE: I will say frankly, I don't think Mr. Miller has changed my idea at all. I think I am of the same opinion still.

MR. MILLER: In that circumstance, I would like to present some stipulations.

THE REFEREE: You don't need stipulations. I am finding against you on the fact. You wrote your own ticket, and here it is. I am not going to change it after the money comes in.

Q BY MR. HUGHES: You represented Mr. Boone at the start of the receivership proceedings, did you not?

A Before bankruptcy. There was a receivership proceeding in the Federal Court, and I say I represented Mr. Boone—Mrs. Mc*Cloud* was the client, but Boone—

Q He paid you your fees, did he not, Mr. Miller?

(Testimony of Edwin J. Miller)

A He came to me to represent her, and I did represent her at his request, but by first obtaining a direct contact with her in Brookfield, Missouri, by long distance telephone.

Q At that time Mr. Boone agreed to advance all costs in the case, to be repaid by Mrs. Mc*Cloud,* did he not?

THE REFEREE: I decided this case once, and just because Mr. Miller thought he didn't have an opportunity to present all of his case—this is the third or fourth time —I have heard his side of the story and still think—he wrote his own ticket. I don't feel I ought to change it. If he put into that contract "Not to be filed if the other people didn't sign it", but he didn't. Personally I think it is going to pay you one hundred cents on the dollar before you get through, Mr. Miller.

MR. MILLER: I was going to say that the items that agreement purports to cover were incurred before he ever came to me and not on my recommendation, and therefore, there was no consideration.

THE REFEREE: I have that in mind.

MR. MILLER: Then, there is a statutory provision about conditional delivery. I don't know whether your Honor has that statute in mind, but—

THE REFEREE: No. I have continued this matter three times to get your story, and I am satisfied. If I am wrong, I am 100% wrong, Mr. Miller.

MR. MILLER: I am sorry, but I feel you are wrong.

THE REFEREE: Don't worry; more than half of the attorneys think I am wrong.

MR. MILLER: I would like the record to show an exception. I feel there was no consideration, and under the statute, both of those were complete defenses.

(Testimony of Dan Boone)

THE REFEREE: Do you want to put any rebuttal in?

MR. HUGHES: In view of the fact that he is contemplating a review, I would like to put Mr. Boone on the stand.

DAN BOONE,

BEING FIRST DULY SWORN, TESTIFIED:

I did have occasion to submit the subrogation agreement to Mr. Miller to sign. In the beginning, when I got authority from Mrs. McLeod, through her attorney, to employ an attorney here, I got in touch with Mr. Miller and he agreed that this money would be returned to me. Over a period of years all moneys necessary I advanced, and I paid what was necessary. When the time came for filing of notice of Account against the Tooey Estate in Bankruptcy, I asked Mr. Miller how would I proceed filing claims against the estate for costs. He said "I advise you to see Mr. Laugharn, he is more familiar with those matters." Mr. Laugharn said "I am satisfied these moneys were actually spent. I suggest you write out an agreement like this"—

THE REFEREE: And in the meantime Mr. Laugharn told you he thought some of those claims were prior claims—

A Yes. He said he could only handle those up to bankruptcy.

THE REFEREE: I so ruled here.

A. So I came back with an agreement along the lines Mr. Laugharn asked me to prepare, or told me about. I talked to Mr. Miller and he checked it over and said

(Testimony of Dan Boone)

"I know all about it. Give it to me and I will sign it." I made no representation about other creditors signing. I went to Mr. Grant—

THE REFEREE: Did you tell Mr. Miller about it?

A Yes, I told Mr. Miller I would see Mr. Grant and see if I could get his clients to sign. He said his clients were in Colorado and he would take the matter up. He never signed, but all of the rest signed willingly.

Q Did you ever make a representation to Mr. Miller that the agreement which he signed, was contingent upon everyone else signing?

A I certainly did not.

Q He had represented you all during this whole Tooey matter?

A Yes.

MR. HUGHES: That is all.

CROSS EXAMINATION.

BY MR. MILLER:

Q I wasn't your attorney then in the matter, was I?

A You were my attorney.

It is true that after filing the bankruptcy proceeding against Tooey that I wanted to employ Mr. Miller to represent me and represent the petitioning creditors. It is further true that on account of the fact that Mr. Miller represented Mrs. McLeod that he told me that he could not represent me. He did represent me in other matters. Messrs. Grant and Hughes represented the petitioning creditors, and I was one of them. They have represented me ever since. They are attorneys for the petitioning creditors in general, not me.

(Testimony of Dan Boone)

THE REFEREE: I will take judicial notice of the fact they represented petitioning creditors, but this relates to money advanced before bankruptcy.

Mr. Miller represented me in the Tooey matter, but that was before bankruptcy. I came to Mr. Miller before the bankruptcy, a year or so, to represent Mrs. McLeod, and he refused to represent her except on a long distance telephone call from her personal representative in Brookfield, Missouri. That was before the receivership was filed in the Federal Court.

Q Didn't you claim he agreed to reimburse you?

A I am claiming you agreed to reimburse me and did not.

Q Don't you claim he agreed to reimburse you?

A No, my agreement was with you.

Q Didn't you file a claim with him?

A No, just checking the items.

Q And didn't he send that to me for checking over as to whether it was right or wrong?

A No, I brought it over to your office. If you have a copy, it is all right. I don't know anything about sending it from Brookfield, Missouri. I sent you a telegram. I prepared the alleged subrogation myself at my home. I wrote the names thereon with a typewriter that *are* there. I wrote the name W. H. Ringle, I did that to show he was one of the creditors. I did not expect all the creditors to sign it, I wanted them to. I tried to get the different ones to sign it, and that is what I said to you that I would get them to sign if possible, but there was a question in my mind about a few of them. I represented twenty-six or twenty-seven creditors. I did not say that Ringle and Grant would sign. Mr. Burns in

(Testimony of Dan Boone)

Missouri refused to recognize my claim, or pay any of it, then I came and talked to you about it last Spring. There was a dispute between you and me about it, not between Mrs. McLeod and me.

Q Isn't it true I said to you on that occasion there was a dispute between you and Mrs. Mc*Cloud*—

A What—

Q Just a moment. I am not through with my question. And Mrs. Mc*Cloud* had refused to recognize any expenses you paid out?

A What you did say to me was "Mrs. Mc*Cloud* is not going to recognize any of your claims after four or five years."

I told Mrs. McLeod that I believed she would shortly realize some of the moneys she lost. I remember when the preferred claim of $3250.00 was filed. I was to see you often. I helped settle her claim. I don't say you did or didn't tell me that you had a letter from Mr. Burns with a copy of the account I left with him. We had conversation. I have a copy of that account myself. You probably showed me that account in your office. I am not positive. This is my signature too.

THE REFEREE: Miller-Mc*Cloud* Exhibit No. 1.

(Said Exhibit No. 1 is the receipt signed by Dan Boone, which is in words and figures as follows:)

I sent you the telegram from Brookfield, Missouri. I had a conversation with Mrs. McLeod and Mr. Burns. Telegram offered in evidence as Miller-Mc*Cloud* No. 2 exhibit.

(Testimony of Dan Boone)

Q Are there any charges in that document, Miller-McCloud No. 3 that you left with Mrs. McCloud or Mr. Burns in Brookfield, Mo., that are duplications?

A I don't recall.

THE REFEREE: You have been trying to do all the talking in this case. Don't get the idea we are joking around here, Mr. Boone. We have stricken several of your claims already. Now, I find another of $185. which is duplicated, according to your own testimony in the last five minutes.

THE REFEREE: Will you make a note, Mr. Hughes, of another $185. to be taken out of his claim?

MR. MILLER: Q You made this subrogation agreement, you say, yourself, and it shows here a total of $3,856.79. That was for expenses incurred before the bankruptcy proceeding?

A Yes, before bankruptcy.

Q Those were all incurred before this subrogation agreement was prepared by you or presented to me?

THE REFERREE: At the time that agreement was signed, you had already paid out the money?

A Yes, sir.

BY MR. MILLER: I want to state that I have at no time represented Mr. Boone in connection with the bankruptcy proceeding of Margaret E. Tooey. He offered that representation to me, but I told him I represented another party and there would be a direct conflict between her claim and that bankruptcy proceeding, and I could not accept because she had a mortgage lien on this property in Oklahoma, and if she were declared a bankrupt it might tend to relegate (militate) against the lien.

(Testimony of Dan Boone)

THE REFEREE: There was a diversity of interest there.

MR. MILLER: Yes. Mr. Boone was apparently displeased about it. When he was in Brookfield, Mo. I received that telegram.

THE REFEREE: He admitted sending it.

MR. MILLER: When Mr. Boone came back from Oklahoma I showed him that statement and told him I had received word from Mr. Burns that he would not allow any item on it. I said to him "I don't want (owe) a cent. I am under no obligation to you at all, but it happens you are a friend of mine and I represent Mrs. McCleod. There is a conflict between these two people. You put up this $100 attorney fee and some expenses and I have got or will get some fees on this preferred claim, and rather than see you lose it, I am going to pay it back. There was an item of $150. in that claim—

THE REFEREE: I have that before me.

MR. MILLER: —that I never sent Mr. Boone a bill for. I said to him, "That can just go out of there; I will waive that. You have paid me $100 and I am going to pay it back." We sat right there and I called the girl in and said "I will dictate to the girl a receipt you can sign, and"—

THE REFEREE: Did you intend to have this instrument of March 19th—it wasn't your intention to wipe out the subrogation agreement?

MR. MILLER: I didn't know anybody was claiming under it.

(Testimony of Dan Boone)

THE REFEREE: You did not put in this receipt of March 19 anything about you and Boone. This refers only to $85 expense in the Tooey-Mc*Cloud* matter handled by Miller and $150 attorney fees in said litigation.

MR. MILLER: That is right. I did that because I didn't want to see Mr. Boone lose it because he couldn't get it from back there. He agreed with it.

THE REFEREE: That may be so, but this agreement, Miller-Mc*Cloud* No. 1, has nothing to do with the subrogation agreement.

MR. MILLER: Yes, but I didn't at any time promise to repay Mr. Boone the expenses or promise to return attorney fees, except on that one occasion I returned them. I got the story from Mr. Burns at Booneville, Mo.

THE REFEREE: Do you know Mr. Burns?

MR. MILLER: No, but I understood from Mr. Boone he represented Mrs. Mc*Cloud* and I felt I could not go into Court without direct authority.

CROSS-EXAMINATION

I am the owner of the Martin claim now; Martin has no further interest in it.

MR. MILLER: I would like, your Honor, the privilege of submitting authorities, because I am satisfied your Honor has in mind—

THE REFEREE: I am satisfied the facts against you, Mr. Miller. You signed a written instrument. You are over 21 years of age and practicing law. I am going to take it for just what it is on its face.

MR. MILLER: If your Honor will be good enough to look at the authorities. In the first place, the California statute makes a condition of delivery—

THE REFEREE: I am finding there wasn't a conditional delivery. I can't find there was a conditional delivery, according to the wording of the instrument. It doesn't say it is conditioned upon everybody signing it, and I can't find that that is what happened The testimony is—Mr. Boone said he came to you and brought the claim to you and costs were advanced at your special instance and request.

MR. MILLER: That is not true.

MR. HUGHES: Did you advance any of them, Mr. Miller?

MR. MILLER: No, I did not.

THE REFEREE: I think in view of the fact that this case is going to pay 100 cents on the dollar, or almost 100 cents on the dollar—

MR. MILLER: I am willing that Mr. Boone should be the first man paid, but I want them all to be alike.

THE REFEREE: That isn't what your agreement states. The agreement doesn't say that.

MR. MILLER: I acknowledge it doesn't.

THE REFEREE: So I am in that position, and I think under all the facts and circumstances I can't find—proof is upon you to ch*ag*e its construction and you haven't done it, Mr. Miller.

MR. MILLER: I think I am right on the law about it.

THE REFEREE: I don't think there is any law to apply to it. Irrespective of whom I believe, I have got to hold the burden of proof hasn't been carried by you to change the terms of a written instrument.

THE REFEREE: I am going to hold that unless you are successful in your review—you have ten days after the order is filed to take your review—I am going to find Mr. Boone did advance a certain amount of money and you knew about it being advanced, and—

Mr. MILLER: That isn't the point I was inquiring about—the effect of the subrogation agreement. Suppose he gets the money out of the creditors whose names appear on there? Then what happens after that? Will they be reimbursed from some other source?

THE REFEREE: If you did a foolish thing in signing, I can't help that.

MR. MILLER: I did do a foolish thing.

THE REFEREE: Under the circumstances I can't find there was any agreement existing between you which is not in writing. I don't think any court would find that way. That is your ticket and you wrote it.

MR. MILLER: Mrs. McLeod doesn't know it yet. I never advised her because I didn't think—

THE REFEREE: I have before me the power of attorney, haven't I?

MR. MILLER: That went to the allowance of her claim, not the giving of it away.

THE REFEREE: I can't agree with you.

The foregoing is appellants' condensed statement, in narrative form, of the evidence introduced upon the trial made in pursuance to Equity Rule 75, paragraph "B" thereof, and lodged in the clerk's office for examination of defendant, as provided by said Rule.

Edwin J. Miller
Attorney for Appellants.

The foregoing narrative statement of the evidence is hereby allowed and approved, and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above styled cause, as provided in paragraph "B" of Equity Rule 75.

Dated: Dec. 4, 1935.

Geo. Cosgrave
Judge of the District Court.

Dec. 4, 1935

Approved as Statement of Evidence only.

K. E. Grant.

[Endorsed]: Received copy of the within Condensed statement of evidence this 30th day of October, 1935. Mott, Vallee & Grant & Gilbert B. Hughes. By K. E. Grant, attorneys for appellees. Lodged Oct. 30, 1935 at 3:10 P. M. R. S. Zimmerman, Clerk By F. Betz, Deputy Clerk. Filed R. S. Zimmerman, Clerk at 35 min. past 2 o'clock Dec. 4, 1935 P. M. By L. Wayne Thomas, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 6th day of September in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Geo. Cosgrave, District Judge.

In the Matter of)
) No. 16976-C - Bkcy.
Margaret E. Tooey, Bankrupt)

This matter having come before the court on July 22, 1935, for hearing on Certificate of Review of Rupert B. Turnbull, Referee, of Order of Alleged Subrogation, being a contest between claimants, pursuant to notice filed July 11, 1935, Argument thereon having been heard and this Cause being thereupon ordered submitted on briefs to be on file within five days, and same being thereafter filed;

The Court, after due consideration, being now fully advised in the premises, orders the Petition for Review denied. Order of the Referee is confirmed. Exception to Petitioner.

[Title of Court and Cause.]

PETITION OF MAZIE McLEOD AND EDWIN J. MILLER FOR ORDER ALLOWING APPEAL.

Mazie McLeod and Edwin J. Miller, petitioners in the petition for review, feeling themselves aggrieved by the final judgment and order made by this court on said petition for review in this said matter on or about September 6, 1935, come now and petition this court for an order allowing them to prosecute an appeal from said final order and judgment, in favor of Dan Boone, said order denying the petition of these petitioners for review, to the United States Circuit Court of *Appeal,* for the Ninth Circuit, under and pursuant to law in that behalf made and provided; and also that an order be made fixing the amount of the security which the petitioners shall give and furnish, and when such security is given and furnished that all further proceedings in this court be suspended and stayed until the final determination of appeal by the United States Circuit Court of *Appeal*, for the Ninth Circuit.

Dated: September 23, 1935.

MAZIE McLEOD and
EDWIN J. MILLER,
By Edwin J. Miller
Attorney for Appellants.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min. past 2 o'clock Sep 23, 1935 P M By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

In the matter of	)	
	)	
MARGARET E. TOOEY,	)	In Bankruptcy
	)	No. 16976-C
	)	ASSIGNMENT OF
	)	ERRORS.
	)	
Bankrupt.	)	

The appellants, Mazie McLeod and Edwin J. Miller, hereby present the following assignment of errors:

1. The court erred in holding that the Referee and the District Court had jurisdiction to hear and determine the controversy between the creditors of the bankrupt estate.

2. The court erred in overruling and denying appellants' petition for review and reversal of the findings, order and judgment of the Referee.

3. The court erred in confirming the Referee's order of subrogation.

4. The court erred in sustaining the petition for subrogation filed by Dan Boone; and erred in denying the petition for review.

5. The court erred in holding that the alleged subrogation agreement was not without consideration and not void.

6. The court erred in refusing to hold that the claim of Dan Boone of $3856.79 was a duplication of other claims already paid, and was fraudulent.

7. The court erred in holding that the alleged subrogation agreement is an assignment; is a subrogation agreement; and was not null and void.

8. The court erred in refusing to hold that the petition of Dan Boone, and the order of the Referee based thereon, was an attempt to enforce an uncompleted gift.

9. The court erred in upholding the order of the Referee finding for Dan Boone without any evidence of the merits of his claim.

10. The court erred in sustaining the order of the referee allowing the claim and alleged subrogation without support in the record.

11. The court erred in refusing to hold that Mazie McLeod had not signed, and had not authorized anyone to sign for her the subrogation agreement.

12. The court erred in upholding the order of the referee to the effect that there was a power of attorney authorizing the signature of Mazie McLeod, and in refusing to hold that said order was entirely without support in the evidence.

13. The court erred in holding liability against Mazie McLeod.

14. The court erred in holding that where the agent acts not for the benefit of the principal, but contrary

thereto, that the agent can charge the principal for such acts.

15. The court erred in holding that the authority of an attorney authorizes the giving away of the estate.

16. The court erred in refusing to hold that the burden of proof was on Dan Boone to establish agency of Mazie McLeod.

17. The court erred in failing to find that Dan Boone's claims against said estate exceeded $44,000.00; and that his services and expenses were done in his own behalf.

18. The court erred in affirming the referee's order, and denying the petition for review of petitioners.

Dated: September 23, 1935.

MAZIE McLEOD and
EDWIN J. MILLER,
By Edwin J. Miller
Attorney, and in Pro Per.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 28 min. past 2 o'clock, Sep 23, 1935 P M By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BOND.

Now on this 23rd day of September, 1935, it appearing to the court that Mazie McLeod and Edwin J. Miller have filed a petition for appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and have prayed for an order fixing the amount of security which shall be given by the said appellants, and for an order of the court that the proceedings in this court be stayed until the final determination of said appeal; and the court being fully advised,

IT IS HEREBY ORDERED:

That the appeal is allowed as prayed, and that the appellants shall furnish an appeal bond in the penal sum of $250.00, and that when the same is filed and approved that all further proceedings in this court be stayed until the final determination of said appeal.

Dated: September 23, 1935.

Geo. Cosgrave
JUDGE.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min past 2 o'clock, Sep. 23, 1935, P M By L. Wayne Thomas, Deputy Clerk.

COST BOND ON APPEAL

Kow all Men by These Presents

That we, Edwin J. Miller and Mazie McLeod, as principals and ...., as Sureties are held and firmly bound unto appellees, Dan Boone and Hubert F. Laugharn, as Trustee, in the full and just sum of Two hundred Fifty ($250.00) - - - - - - - - - - - Dollars cash to be paid to the said appellees, Dan Boone and Hubert F. Laugharn, as trustee, ... certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of October, in the year of our Lord One Thousand Nine Hundred and thirty-five.

WHEREAS, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit depending in said Court, In the Matter of Edwin J. Miller and of the Estate of Margaret E. Tooey, Bankrupt, Mazie McLeod, petitioners, v. Dan Boone and Hubert F. Laugharn, Trustee, a Judgment was rendered against the said Edwin J. Miller and Mazie McLeod, denying the petition for review of the order of Referee Turnbull, for subrogation, and the said Edwin J. Miller and Mazie McLeod having obtained from said Court an order granting leave to appeal to the

United States *District* Court, of Appeals for the Ninth District, to reverse the Judgment in the aforesaid suit, and a Citation directed to the said Dan Boone and Hubert F. Laugharn, as trustee, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 23rd day of October, 1935.

Now, the condition of the above obligation is such, that if the said Edwin J. Miller and Mazie McLeod shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

Mazie McLeod by
Edwin J. Miller Atty

Edwin J. Miller [Seal]

Principals.

124 West Sixth Street
Los Angeles, California.

Cash $250 Security

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA } ss:
COUNTY OF Los Angeles

Edwin J. Miller being duly sworn, says that he is the owner of the sum of Two hundred Fifty Dollars ($250.00) *Dollars,* deposited this day with the Clerk as security on the within bond.

Subscribed and sworn to before me, this 4 day of October A. D. 1935.

Edwin J. Miller

124 West Sixth Street, Los Angeles, Cal.
(Address)

R. S. Zimmerman, Clerk U. S. District Court, Southern District of California By Robert P. Simpson, Deputy

[Seal]

[Endorsed]: Filed R. S. Zimmerman Clerk at 6 min. past 3 o'clock Oct. 4, 1935 P. M. By L Wayne Thomas, Deputy Clerk.

Form of bond and sufficiency of sureties approved. R. S. Zimmerman, Clerk.

[Title of Court and Cause.]

ORDER.

(Appeal by Mazie McLeod and Edwin J. Miller from Order of Subrogation.)

BEFORE THE HON. GEORGE COSGRAVE, JUDGE:

Whereas, in the above entitled appeal, the appellants filed with the clerk of this court a praecipe for the making up of the record for the appeal, said praecipe having been filed on or about December 5, 1935, which said praecipe was and is in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	)	
	)	
MARGARET E. TOOEY,	)	In Bankruptcy
	)	No. 16976-C
Bankrupt.	)	PRAECIPE
	)	
	)	

TO THE CLERK OF SAID COURT:

Please prepare and transmit to the clerk of the United States Circuit Court, for the Ninth Circuit, a transcript of the record upon the appeal taken by Mazie McLeod and Edwin J. Miller from the order confirming the Referee's order of subrogation; and overruling and denying the petition for review, which said order appealed from was dated

on or about September 6, 1935, and include therein the following documents:

1. The petition to have Margaret E. Tooey adjudged an involuntary bankrupt; and the order making the adjudication.

2. A statement of all claims, and all claims filed against said estate.

3. The petition of Dan Boone filed March 13, 1935.

4. The petition of Dan Boone filed March 22, 1935.

5. The petition for subrogation.

6. Amended objections to subrogation.

7. Order of subrogation.

8. Petition for review of subrogation.

9. Certificate of review.

10. Minute order of Judge Cosgrave made on or about September 6, 1935.

11. Petition for an appeal to the Circuit Court of *Appeal,* and Order allowing same.

12. Assignment of errors.

13. Citation on appeal, with proof of service.

14. Cost bond on appeal.

15. Statement of evidence, settled, signed and filed December 4, 1935.

16. Order of Court striking out portions of statement of evidence, and proposed amendments to statement of evidence.

17. Orders of court extending time for settling statement of evidence and filing transcript in Circuit Court of *Appeal.*

18. The order of Judge Cosgrave on Referee to certify certain documents to this Court, to be included in the transcript on appeal, dated September 23, 1935.

19. Your customary form of certificate of transcript.

Dated: December 5, 1935.

Edwin J. Miller
Attorney for appellants.

WHEREAS, a copy of said praecipe was served on the attorneys for appellees on or about December 5, 1935; and whereas within ten days thereafter, to-wit, December 11, 1935, the attorneys for the appellees served on counsel for appellants and filed a notice that they would on Monday, December 16, 1935, at the hour of two o'clock P. M., or as soon thereafter as counsel could be heard, move to exclude certain documents from the record specified in the praecipe, which said notice and motion were and are in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of)

MARGARET E. TOOEY,)

Bankrupt.)

)

———————)

MAZIE McLEOD and EDWIN J. MILLER,) No. 16976-C

) NOTICE

Appellants,

)

vs.

)

DAN BOONE and HUBERT F. LAUGHARN, Trustee,)

)

Appellees.

)

TO MAZIE McLEOD AND EDWIN J. MILLER, APPELLANTS IN THE ABOVE ENTITLED CAUSE, AND TO EDWIN J. MILLER, ESQ., THEIR ATTORNEY:

You, and each of you, will please take notice that DAN BOONE, as appellee in the above entitled cause, will ap-

pear before the Honorable Geo. C. Cosgrave, Judge of the above entitled court, on Monday, December 16, 1935, at the hour of 2:00 o'clock P. M. or as soon thereafter as counsel can be heard and will at said time call up for hearing appellee's motion to exclude certain documents referred to in appellants' praecipe herein from the transcript of record on the appeal taken by Mazie McLeod and Edwin J. Miller from the decision of the above entitled court entered herein on or about September 6, 1935.

Dated: December 11, 1935.

MOTT, VALLEE AND GRANT
and G. B. HUGHES,
By K. E. Grant
Attorneys for appellee
Dan Boone

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of)

MARGARET E. TOOEY,)

Bankrupt.)

No. 16976-C

MOTION FOR EXCLUSION FROM TRANSCRIPT OF RECORD ON APPEAL OF PARTICULAR DOCUMENTS CALLED FOR IN PRAECIPE OF APPELLANT.

MAZIE McLEOD and EDWIN J. MILLER,

Appellants,

vs.

DAN BOONE and HUBERT F. LAUGHARN, Trustee,

Appellees.

Comes now DAN BOONE, one of the above named appellees, and respectfully moves the court to exclude from the transcript of record herein upon the appeal taken by Mazie McLeod and Edwin J. Miller from the decision of this court made on or about September 6, 1935, the following documents referred to in the praecipe of appellants filed herein December 5, 1935:

1. GROUP ONE

a) Petition to have Margaret E. Tooey adjudged an involuntary bankrupt and the order of adjudication thereon;

b) A statement of all claims, and all claims filed against said estate;

c) Petition of Dan Boone filed March 13, 1935;

d) The order of the above entitled court striking out portions of evidence, and proposed amendments to statement of evidence.

e) The order of the above entitled court on the referee in bankruptcy to certify certain documents to this court, to be included in the transcript on appeal, dated September 23, 1935.

Motion for the exclusion of the above designated documents is made upon the ground that none of said documents constitutes any part of the record upon the above mentioned appeal of Mazie McLeod and Edwin J. Miller, and exclusion thereof from the record has heretofore been ordered by the above entitled court.

2. GROUP TWO

a) The petition for subrogation;

b) Amended objections to subrogation;

c) Order of subrogation;

d) Certificate of review

Motion to exclude the last mentioned documents is made on the ground that each thereof has been included by appellants in their condensed statement of evidence, already settled, signed and filed, and that the inclusion thereof in the record is but useless repetition.

Dated: December 11, 1935.

MOTT, VALLEE AND GRANT
and G. B. HUGHES,

By K. E. GRANT

Attorneys for appellee
Dan Boone.

WHEREAS, on December 16, 1935, at the hour of two o'clock P. M., before the Hon. George Cosgrave, Judge, said motion of the appellee, Dan Boone, was heard before the court; and the court being advised, granted said motion of said appellee and ordered that the following documents specified in the praecipe be stricken therefrom, and not be included in the record, to-wit:

GROUP ONE

a) Petition to have Margaret E. Tooey adjudged an involuntary bankrupt and the order of adjudication thereon;

b) A statement of all claims, and all claims filed against said estate;

c) Petition of Dan Boone filed March 13, 1935;

d) The order of the above entitled court striking out portions of statement of evidence, and proposed amendments to statement of evidence.

e) The order of the above entitled court on the referee in bankruptcy to certify certain documents to this court, to be included in the transcript on appeal, dated September 23, 1935.

GROUP TWO

a) The petition for subrogation;

b) Amended objections to subrogation;

c) Order of subrogation;

d) Certificate of review.

IT IS ORDERED BY THE COURT That the following documents be included in the transcript of the record, and none other, to-wit:

1. The petition of Dan Boone filed March 22, 1935.

2. Petition for review of subrogation.

3. Minute order of Judge Cosgrave made on or about September 6, 1935.

4. Petition for an appeal to the Circuit Court of *Appeal*, and Order allowing same.

5. Assignment of errors.

6. Citation on appeal, with proof of service.

7. Cost bond on appeal.

8. Statement of evidence, settled, signed and filed December 4, 1935.

9. Orders of court extending time for settling statement of evidence and filing transcript in Circuit Court of *Appeal*.

10. Your customary form of certificate of transcript.

IT IS FURTHER ORDERED That the clerk of this court shall make up said transcript composed of the foregoing documents.

Dated: December 20, 1935.

Geo. Cosgrave
JUDGE OF THE UNITED STATES
DISTRICT COURT.

Dec. 20, 1935.

Approved as to form as provided in Rule 44.

Mott, Vallee & Grant,
and Gilbert B. Hughes
By K. E. Grant

[Endorsed]: Received copy of the within Order this 20th day of December, 1935. Mott, Vallee & Grant and Gilbert B. Hughes, attorneys for appellees. Filed R. S. Zimmerman, Clerk at 10 min past 3 o'clock Dec. 20, 1935 P. M. By F. Betz, Deputy Clerk

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 79 pages, numbered from 1 to 79, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for allowance on account of expenditures and services in behalf of bankrupt estate; petition for review of Referee's order; statement of evidence; order denying petition for review; petition for appeal; assignment of errors; order allowing appeal; cost bond on appeal; and order re praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to .... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this .... day of January, in the year of our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8104

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
MARGARET E. TOOEY,
a Bankrupt.

Mazie McLeod and Edwin J. Miller,
Appellants,

vs.

Dan Boone, a petitioning Creditor, and Hubert F. Laugharn, trustee in bankruptcy,
Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL.

FILED
MAR 12 1936
PAUL P. O'BRIEN,
CLERK

KENNETH E. GRANT and
GILBERT B. HUGHES,
1215 Citizens National Bank Bldg., Los Angeles,
Solicitors for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 8104

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
MARGARET E. TOOEY,
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Mazie McLeod and Edwin J. Miller,
Appellants,
vs.
Dan Boone, a petitioning Creditor, and Hubert F. Laugharn, trustee in bankruptcy,
Appellees.

BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL.

To the Honorable Circuit Justice and Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

On special assignment by the court, appellees on February 25, 1936 in open court moved for dismissal of the appeal herein. Pursuant to the court's order appellees submit this brief in support of the motion.

Nature of the Order Appealed From.

Appellants appealed from an order of the District Court affirming an order of the referee in bankruptcy by which assignment by certain creditors of the bankrupt to Dan Boone of an interest in their claims was recognized and the allowed claims of such creditors subrogated *pro tanto* to the assignment in favor of Boone.

The instrument by which appellants, with others not complaining, transferred a portion of their respective claims to Boone appears in the transcript of record on file at pages 28 to 31 both numbers inclusive. The referee's order was made on petition of Dan Boone and after notice to each of the assigning creditors.

The proceeding was a mere step in the ordinary and routine administration of the bankrupt estate. It involved nothing more than a determination by the referee that appellants had transferred to Boone an interest in their claims against the bankrupt estate and an order to the trustee directing him to make dividend payments on allowed claims accordingly.

Basis of Appellees' Motion to Dismiss.

Appellees base their motion to dismiss the appeal on the following grounds:

1. The appeal involves a "proceeding" in bankruptcy and not a "controversy" in bankruptcy.

2. Involving a "proceeding" in bankruptcy the appeal could be taken only pursuant to the provisions of section 24b of the Bankruptcy Act, now United States Code, Tit. 11, Section 47b.

3. The appeal was allowed by the District Court and not by the Circuit Court of Appeals as required by section 24b of the Bankruptcy Act.

4. No proper appeal having been taken by appellants within the thirty-day period provided for appeal by section 24c of the Bankruptcy Act (11 U. S. C. A. section 47c) the Circuit Court of Appeals is without jurisdiction to entertain the appeal.

Law of the Case.

1. The "controversies" arising in bankruptcy referred to in section 24a of the Bankruptcy Act include those matters arising in the course of a bankruptcy proceeding which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise, distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate.

> *Taylor, Trustee, etc. v. Voss, Trustee,* 271 U. S. 176, 46 S. Ct. 461, 70 L. Ed. 889.

Appellees respectfully submit that the routine nature of the subject matter of the order complained of clearly shows that we are not concerned with a "controversy" in bankruptcy which could be appealed to this court under section 24a of the Bankruptcy Act on allowance by the District Court. The trustee in bankruptcy was in no sense a party to the proceeding although appellants have joined him as a party to their appeal. There was no proceeding adverse to the trustee or the estate he represents. The matter involved nothing more than the question of how dividends on certain claims should be paid, *pro tanto* assignment in favor of Boone having been made by the respective creditors. The proceeding was purely routine in the administration of the estate and in no sense involved a "controversy" in bankruptcy as that expression is used in the bankruptcy law. And, again, the proceed-

ing does not fall within any of the three categories referred to in section 25 of the BankruptcyAct, 11 U. S. C. A. section 48, where an appeal is allowed as a matter of right.

2. Since the order appealed from involved a "proceeding" in bankruptcy and not a "controversy" arising in bankruptcy proceedings, appeal could only be taken within thirty days from the date of the order complained of, by consent of the Circuit Court of Appeals.

> Section 25b, *Bankruptcy Act,* 11 U. S. C. A. section 47b;
>
> *Deeley v. Cincinnati Art Pub. Co.,* 23 Federal Reporter (2nd) 920;
>
> *Childs v. Ultramares Corp.,* 40 Federal (2nd) 474;
>
> *In re Torgovnick,* 49 Federal (2nd) 211;
>
> *Hirschfeld v. McKinley,* 78 Federal (2nd) 124.

3. As appeal could be taken only after application to the Circuit Court of Appeals for leave, and after leave granted by said court, allowance of the appeal by the District Court is ineffective.

> *In re Torgovnick,* 49 Federal (2nd) 211;
>
> *Broders v. Lage,* 25 Federal (2nd) 288 (C. C. A. 8);
>
> *Stanley's Incorporated Store v. Earl,* 25 Federal (2nd) 458 (C. C. A. 8);
>
> *American State Bank v. Ullrich,* 28 Federal (2nd) 753 (C. C. A. 8);
>
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> *Shoreland Co. v. Conklin,* 30 Federal (2nd) 489 (C. C. A. 5);

In re Merchants' Oil Co., 36 Federal (2nd) 655 (C. C. A. 10);

Gate City Clay Co. v. Dickey, 39 Federal (2nd) 581 (C. C. A. 8).

4. The appeal not having been allowed by the Circuit Court of Appeals within the time prescribed by section 25c of the Bankruptcy Act, the court is now without jurisdiction to entertain the appeal from an order involving only a "proceeding" in bankruptcy.

Deeley v. Cincinnati Art Pub. Co., 23 Federal (2nd) 920 (C. C. A. 6).

Conclusion.

From the foregoing, appellees respectfully submit it clearly appears that the court is without jurisdiction to entertain the appeal herein and that the same should be disposed of by an order of dismissal.

Respectfully submitted,

KENNETH E. GRANT and
GILBERT B. HUGHES,
By GILBERT B. HUGHES,
Solicitors for Appellees.

3

No. 8104

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

MARGARET E. TOOEY,
a Bankrupt.

Mazie McLeod and Edwin J. Miller,
Appellants,

vs.

Dan Boone, a petitioning Creditor, and Hubert F. Laugharn, trustee in Bankruptcy.
Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL.

KENNETH E. GRANT and
GILBERT B. HUGHES,
1215 Citizens National Bank Bldg., Los Angeles,
Solicitors for Appellees.

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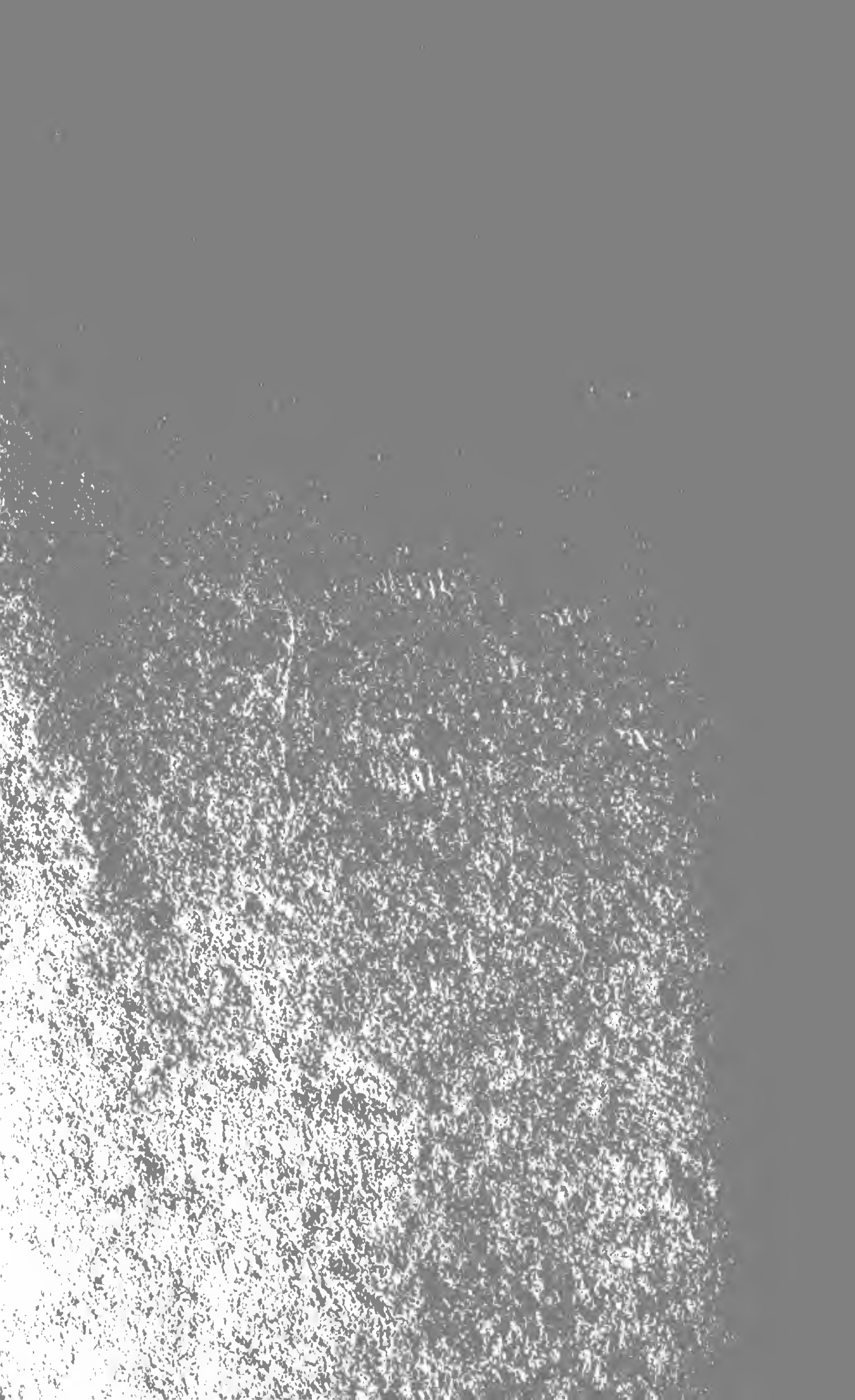

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REPLY BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL.

To the Honorable Circuit Justice and to the Circuit Judges of the United States Circuit Court of Appeals of the Ninth Circuit:

Appellants' brief in reply to appellees' motion to dismiss the above appeal concerns itself much more with the merits of the appeal than it does with the pure question of law which is presented by the motion to dismiss.

Feeling as appellees do that the court at this stage of the proceeding is not interested in the merits of the cause appellees in this brief will not endeavor to answer any

portion of appellants' reply brief except that dealing with the merits of the motion to dismiss, and we are inclined to leave the matter for the decision of the court on the briefs already filed. Appellees feel that General Order in Bankruptcy XXI, section 3, presents a complete answer to the extended argument of appellants; and with brief reference to this General Order, and its application to this matter, appellees will rest.

The Appeal Involves a "Proceeding" in Bankruptcy and Not a "Controversy", and Not Having Been Taken in the Manner and the Time Provided by Law Should Be Dismissed.

Appellees will not burden the court with a repetition of the points and argument made by them in their opening brief.

The instrument by which appellants and others assigned to Dan Boone speaks for itself [Transcript of Record, pages 28 to 31, inclusive]. It definitely authorizes, appellees submit, a *pro tanto* subrogation of appellants' allowed claims in favor of Boone.

General Order in Bankruptcy XXI, section 3, provides in part as follows:

> ". . . Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter."

The very existence of this General Order shows the routine nature of the proceeding from which appeal has been taken, and definitely establishes it as a "proceeding," rather than a "controversy." The cases cited by appellants are easily distinguished from the case at bar. Those cases clearly involved "controversies" between strangers to the bankruptcy proceedings, and in most of the cases cited no *res* was in the possession of the trustee for distribution.

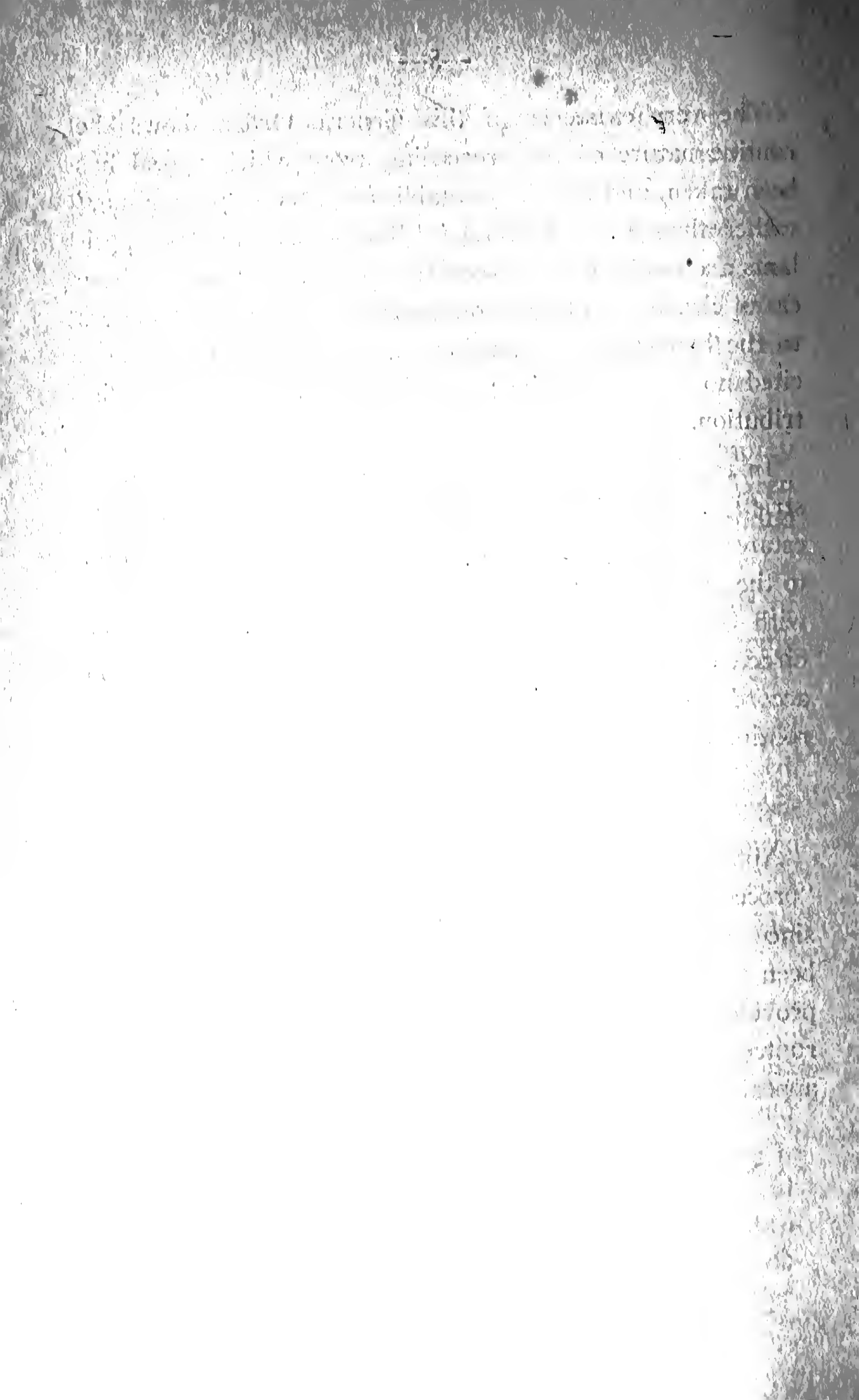
In the instant case the order appealed from was made strictly with relation to distribution of the bankrupt's estate; the claims of appellants were subrogated *pro tanto* to the assignment in favor of Boone strictly in accordance with General Order XXI, section 3, and the trustee was directed to make payment of the funds in his possession accordingly. Plainly this involves nothing unusual in the routine administration of a bankrupt estate.

Conclusion.

Appellees respectfully submit that since only a routine "proceeding" in bankruptcy is involved in this appeal and since the appeal, as pointed out in the opening brief, has been taken with entire disregard of the time and manner provided for appeals involving "proceedings" in bankruptcy, the court is without jurisdiction to consider the appeal and an order of dismissal is proper.

Respectfully submitted,

Kenneth E. Grant and
Gilbert B. Hughes,
By Gilbert B. Hughes,
Solicitors for Appellees.



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Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

APR 10 1936

PAUL P. O'BRIEN,

CLERK

EDWIN J. MILLER,
124 West Sixth Street,
Los Angeles, California,
Attorney for Appellants.

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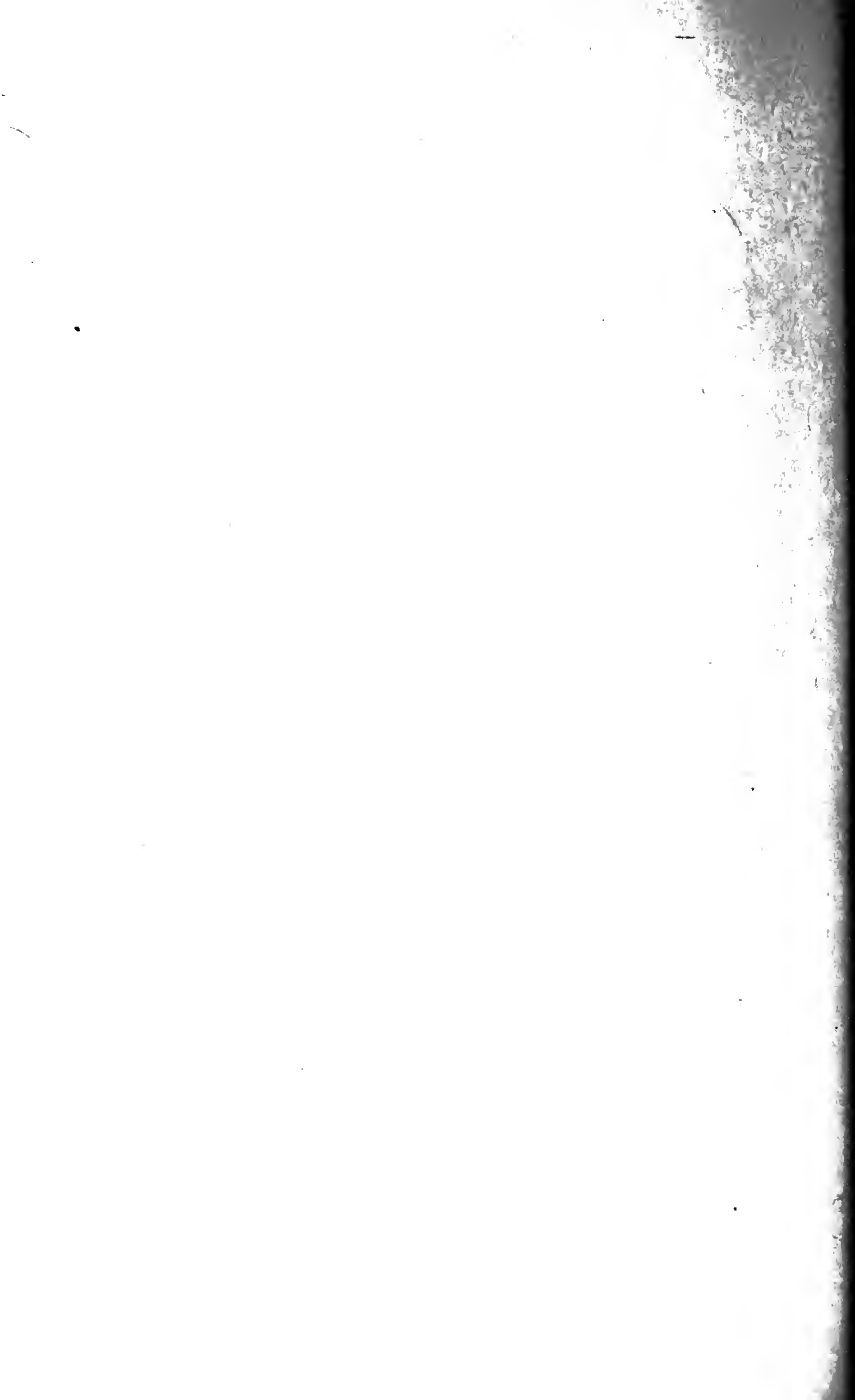

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of MARGARET E. TOOEY, a Bankrupt.

MAZIE McLEOD and EDWIN J. MILLER,
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vs.
DAN BOONE, a Petitioning Creditor, and HUBERT F. LAUGHARN, Trustee in Bankruptcy,
Appellees.

No. 8104

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

To the Honorable Circuit Justice, and to the Circuit Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Come now the appellants and file this their brief and memorandum of authorities in opposition to the motion to dismiss appeal.

The motion to dismiss the appeal was made while the proceeding for leave to supply additional parts of the record was before the court. This brief and memorandum is addressed in resistance of the motion to dismiss only. But may we at this point suggest:

(1) That whether or not this case is appealable under section 24(a) of the bankruptcy act; and therefore

(2) Whether it is decided to be a "controversy" or a "proceeding" depends upon the record in the case; and before this court can really know what the case is about and know whether it is a "controversy" or whether it is merely a "proceeding" in bankruptcy, the court should have before it for consideration on this motion the several documents certified and presented to the court in support of the motion to supply additional parts of the record.

(3) As an illustration of the foregoing, the court necessarily needs to have before it, in disposing of this motion, the certificate of review made by the referee, which is certified and presented with the motion in the diminution proceedings; as well as the several other documents, claims and files, certified copies of which are presented in the diminution proceeding; all of which the District Court struck from the certificate of evidence and directed the clerk not to include them in the transcript of the files proper in the case.

Therefore, we are suggesting to your honors that in justice to the appellants, and in justice to the court before which this motion is being presented, it might

be well to postpone the final determination of this motion to dismiss the appeal, until the missing portions of the record are supplied by the diminution proceedings. We further suggest that whether the motion should, or should not, be granted depends upon facts to be presented on the hearing on the merits, as was the case in *Bank v. Title Co.,* 198 U. S. 280.

However, inasmuch as the Circuit Court of Appeal has ordered that the motion to dismiss be heard first, we are presenting herewith our points and authorities in resistance of said motion.

APPELLEES' POINTS

We shall first notice the points made by appellees in support of their motion to dismiss; then, in a later portion of this brief, we shall present our own points and authorities in support of our opposition.

At page four of appellees' brief they say:

> *"Appellants appealed from an order of the District Court affirming an order of the Referee in Bankruptcy by which assignment by certain creditors of the bankrupt to Dan Boone of an interest in their claims was recognized and the allowed claims of such creditors subrogated pro tanto to the assignment in favor of Boone."*

We take decided issue with that statement of fact, and in opposition thereto we allege that the instrument which they designate as *"assignment"* is not an *"assignment"*; and no interest in said claims, moneys, nor dividends, passed to Dan Boone thereby. Neither

does said instrument create a lien on the dividends; and it cannot properly form the basis for a subrogation judgment.

This instrument is set out in the transcript, pp. 28 to 31, to which we respectfully refer; and invite attention to the fact, that after setting out a supposed itemized statement which is in many respects very infirm and misleading, and the items which, in part, have already been paid by the order of the referee, viz., the two last items therein, aggregating $1474.20; being duplications of items already paid, as shown by the documents lodged with the clerk of this court in support of a pending motion, for leave to file same in this court on suggestion of diminution of the record.

After the list of claims, the particular language of the document which appellees claim is an assignment, is found on page 30 of the transcript; and the court will note that the language there used is not an assignment; but purports to be a promise (without consideration) to pay out of certain funds. It is not an order on anybody; it is not an authorization for anybody to pay; and said document and said items therein mentioned form the basis of a claim filed by Dan Boone against the bankrupt estate, and form the basis also of his three petitions for subrogation, a part of one of said petitions being shown in the transcript (pp. 26 to 31); and the other petitions being shown in the certified copies sought to be filed in this case on suggestion of diminution of the record. (That Boone filed a claim

against the estate for this $3856.79, see subrogation order, Tr., 36.)

The legal effect of the language which appellees refer to as an *"assignment"* is nothing more than a purported promise to pay; and that promise is entirely without consideration, and so purports to be on its face; and was obtained by improper means, as set out in our objections thereto, shown in the transcript (pp. 32 to 35); and as shown in the verbal testimony.

It is, therefore, in effect a suit by Dan Boone against Mazie McLeod and Edwin J. Miller, filed in the bankruptcy court to enforce what is alleged to be a contract and agreement; it is in the nature of a suit in attachment, to enforce an uncompleted gift, by which declared dividends are sought to be reached and to be taken in satisfaction of said alleged obligation; all of which (as has been decided by the Federal Court many times) cannot be done. The Referee and the District Court had no jurisdiction of the controversy, and should have dismissed the proceedings.

Re Girard Glazed Kid Co., 136 F. 511;

Nixon v. Michaels, 38 F. 2d, 420, and cases therein cited;

Re Hollander, 181 F. 1019;

Re Swofford Bros., 180 F. 549.

The above authorities, and others hereinafter cited, show that this is not a *"proceeding"* in the usual routine of bankruptcy proceedings, but is a "controversy" which is appealable under section 24a, and of which

this court can and should take jurisdiction, and reverse the District Court, and order the proceedings dismissed. Our objections and appeal raised the jurisdictional question. (See Tr., 22, par. 3.) The above authorities, with those hereinafter cited, refute every point made by appellees.

OUR POSITION

In order to show that this record presents a case which is usually designated by our higher courts as a *"controversy,"* as distinguished from a mere routine *"proceeding"* in the usual course of administration of a bankruptcy case, we think it will be helpful to this court to call attention on this preliminary motion to character of the "controversy" so that this court will see that it is not a routine matter *"proceeding."*

The referee's order (Tr., 38) and appellees' brief (p. 4) call the transaction *"subrogation."* We beg leave at this point to suggest that subrogation proceedings are not the usual routine matters that occur in the ordinary administration of bankruptcy cases.

In so doing we call attention to some, but not all, of the points of controversy which will come up properly on the hearing on the merits, but which we believe should be here suggested, so that the court can see that this is not a mere proceeding, but is a *"controversy"* appealable, both as to law and fact, and comes under section 24a, and that the appeal was properly allowed by the District Court.

Bank v. Title Co., 198 U. S. 280.

We call the action one in the nature of an independent suit in assumpsit, on the contract, which they (appellees and the referee) call, at some points an assignment, and at other times a subrogation agreement. It is neither an assignment nor a subrogation agreement, and the suit is also in the nature of an attachment. The District Court had no jurisdiction to adjudicate it, as the authorities which we shall hereinafter cite, we think, will conclusively show.

I.

THE AGREEMENT IS NOT A SUBROGATION AGREEMENT BUT AN OFFER OR PROMISE, WITHOUT CONSIDERATION, TO MAKE A GIFT.

There is a good definition of *"subrogation"* in the case of *Arp v. Blake,* 63 Cal. App. 362, at 367, as follows:

> *"The right of subrogation can arise only in favor of one who has, under some duty or compulsion, paid the debt of the other. It arises where one having a liability in the premises pays the debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. The doctrine of subrogation requires that the person seeking its benefit must have paid a debt due to a third person before he can be substituted to that person's rights, and it is not the liability to pay, but the actual payment to the creditor which raises the equitable right. (Aetna Life Ins. Co. v. Middle-*

port, 124 U. S. 534 (31 L. Ed. 537, 8 Sup. Ct. Rep. 625, see, also, *Rose's U. S. Notes*); 25 R. C. L. 1312, 1315.) See, also, *Matzen v. Shaeffer*, 65 Cal. 81 (3 Pac. 92); *Darrough v. Herbert Kraft Co. Bank,* 125 Cal. 272 (57 Pac. 983.)"

See Webster's definition of "subrogation" as follows:

"The substitution of one person in the place of another as a creditor; the new creditor succeeding to the rights of the former; the mode by which a third person who pays a creditor succeeds to his rights against the debtor."

Governed by the above definitions, and by the authorities above cited, we say that the alleged agreement (Tr., 30) does not authorize subrogation—is not a subrogation agreement; it does not support the three petitions for subrogation, one of which is shown in part at transcript 27. It does not support the order of subrogation (Tr., 36, 37 and 38); and it must be apparent that this is nothing more than a suit in assumpsit for which the bankruptcy court is sought to be used, whereas in truth said bankruptcy court has no jurisdiction to hear or adjudicate upon the controversy. It is a "controversy" as distinguished from a "proceeding," and is appealable under 24a.

Pratt Lumber Co. v. Gill, 278 Fed. 783;
Smedley v. Speckman, 157 Fed. 815.

II.

THAT THERE WAS NO ASSIGNMENT; THERE WAS NO LIEN; NO SUBROGATION; SIMPLY A PROMISE WITHOUT CONSIDERATION TO MAKE A GIFT; WAS ENTIRELY UNENFORCEABLE, SEE THE FOLLOWING AUTHORITIES:

Fidelity v. Rogers, 180 Cal. 686;
Ritter v. Stevenson, 7 Cal. 388;
Pullen v. Placer, 138 Cal. 170;
Clay v. Walton, 9 Cal. at 334;
Christmas v. Russell, 81 U. S. 69;
Dillon v. Barnard, 88 U. S. 430;
Smedley v. Speckman, 157 F. 815;
Pratt Lumber Co. v. Gill, 278 F. 783.

The error of the Referee, of the District Court and of opposing counsel in treating and finding that said document is an "*assignment*" is apparent by the above authorities. This is a "*controversy,*" not a "*proceeding.*"

III.

ANTECEDENT DEBT; AND/OR PAST CONSIDERATION; NOT SUFFICIENT TO SUPPORT PROMISE, ("A CONTROVERSY").

Golinsky v. Allison, 114 Cal. 461;
Comstock v. Breed, 12 Cal. 286;
Leverneaux v. Hildreth, 80 Cal. 139;
Chaffee v. Browne, 109 Cal. 211;

Lagamarsino v. Giannini, 146 Cal. 545;
Christian College v. Hendley, 49 Cal. 347.

It must, therefore, be apparent that this is not one of the usual and ordinary steps in the administration of bankruptcy, such as usually comes under the term of "proceeding"; but rather is one of those unusual circumstances and controversies which come under the term "controversies" in bankruptcy and is therefore appealable under section 24a. The language of the document, itself, refutes the finding of the referee as to consideration. Both the document itself and the testimony show that it was a past consideration.

IV.

NO AUTHORITY FROM MAZIE McLEOD — NO AGENCY — NO PROMISE — NO ASSIGNMENT — AND NO SUBROGATION BY HER.

There was no power of attorney held by Edwin J. Miller from Mazie McLeod when he signed the alleged subrogation agreement; she had given him no authority to sign for her, and she did not know of his acts (she was at Brookfield, Missouri, and he, at Los Angeles); and he so stated to Mr. Boone when he signed it. (See Tr., 34, 35, 42, 48, 49, 54, 55 and 57.) Yet the referee and the court held that the power of attorney on file gave authority to bind her. This power of attorney is attached to her claim and was never executed by her (see claim certified and filed herein on diminution proceedings). See *Engle v. Aetna Casualty,* 85 C.

41, at 46

A. D., (decided March 25, 1936). Yet the referee held, apparently, that this unexecuted power of attorney bound Mazie McLeod; and he refused to put the burden on Mr. Boone to prove authority given by her for the signature of the alleged subrogation agreement (the document was not signed by Mazie McLeod). There was no evidence offered tending to show authority to bind Mazie McLeod; yet there was evidence offered affirmatively showing that there was no authority to bind her. Under this condition of the record the act of the referee in rendering a judgment against her for more than $1,000.00, without proof of authority to bind her, was erroneous.

See:

Code of Civil Procedure, section 1981;
Scott v. Wood, 81 Cal. 398;
Whitaker v. Regents, 39 Cal. App. 111;
Estate of Latour, 140 Cal. 414;
Russell v. Banks, 11 Cal. App. 454;
Blum v. Robertson, 24 Cal. 127;
Golinsky v. Allison, 114 Cal. 458;
Hibernian Bank v. Moore, 68 Cal. 156;
Alcorn v. Buschke, 133 Cal. 655;
Billings v. Morrow, 7 Cal. 171;
Thomas v. Anthony, 30 Cal. App. 217;
Taylor v. Robertson, 14 Cal. 396;
Muggett v. Day, 12 Cal. 139;
Stetson v. Briggs, 114 Cal. 511;
People v. Roy, 91 Cal. App. 781;
Perkins v. Pacific, 132 Cal. 280;

Peterkin v. Randolph, 48 Cal. App. 302;
Ewing v. Hayward, 50 Cal. App. 708;
Pease v. Fink, 3 Cal. App. 31;
McDonald v. Kool, 134 Cal. 502;
Burns v. McCain, 107 Cal. App. at 291;
Preston v. Hall, 50 Cal. 43;
Woerner v. Woerner, 171 Cal. 298.

This suit cannot be held to be one of the usual routine matters arising in the course of administration of bankruptcy cases.

V.

AN ALLOWANCE OF AN APPEAL BY THE CIRCUIT COURT OF APPEALS WAS NOT NECESSARY. THE APPEAL IS UNDER SECTION 24a.

Nixon v. Michaels, 38 Fed. 2d 420;

Remington on Bankruptcy, 3d Ed., sec. 2191 and 2199;

Henrie v. Henderson, 145 Fed. 316;

Re Swofford, 180 Fed. 549.

This being true, the motion to dismiss the appeal should be denied.

VI.

EVEN IF THERE IS A RES IN POSSESSION OF THE BANKRUPT COURT DOES NOT FOLLOW THAT IT MAY BE REACHED AND LITIGATED BETWEEN TWO PERSONS IN A CONTROVERSY, IN WHICH THE CREDITORS, AS A WHOLE, HAVE NO INTEREST; AND IN WHICH THE ESTATE AND THE TRUSTEE HAS NO INTEREST EXCEPT AS STAKEHOLDER.

Nixon v. Michaels, supra;
Re American Telephone Co., 211 Fed. 88;
Re Hollander, 181 Fed. 1019;
Re Argonaut Shoe Co., 187 Fed. 784;
First National Bank v. Chicago, 198 U. S. 280;
Re Amy, 263 Fed. 8.

VII.

THE FACT THAT THE MONEY IS IN THE POSSESSION OF THE TRUSTEE DOES NOT GIVE THE REFEREE, NOR THE DISTRICT COURT, THE RIGHT TO LITIGATE THE CONTROVERSY WHERE THERE IS NO LIEN UPON THE FUND, AND TITLE HAS NOT VESTED BY ASSIGNMENT.

In *Re Hollander,* 181 Fed. 1019, the fund was in the possession of the trustee; the law of Maryland permitted attachments and garnishees of moneys in trustee's hands; the controversy came before that court in

a manner very similar to that which is before the court in the case at bar and the court there said:

> *"Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions. But where, as in this case, the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend."*

VIII.

The $3856.79 claim, which is the basis of the alleged "subrogation" was not a provable claim against the estate of Margaret E. Tooey, Bankrupt; and in this respect it is similar to the case of Nixon v. Michaels, 38 Fed. 2d, 420 in which the court on that subject said:

> The complainants, M. C. Jones, Annie L. Jones and J. P. Jones, are not creditors of T. R. Jones, the bankrupt, and they do not claim to be such. *Their claim is not a provable debt against the bankrupt's estate. . . . Moreover, this controversy is one in which the trustee in bankruptcy and the unsecured creditors have no interest.*
>
> "In the case at bar the court did not have possession of the property, and the complainants in their bill *do not claim ownership thereof or a lien*

thereon; but, as we have said, they seek to have a trust declared in the property, *and a superior lien thereon decreed* in their favor. . . .

"We are of opinion that this proceeding *cannot be considered one for the administration and distribution of the property of the bankrupt,* and is in no proper *sense a bankruptcy proceeding, and that the district court was without jurisdiction in the cause.*

"Applying the principles announced in the foregoing cases to the facts in the case at bar, and bearing in mind that the intervenors were not creditors of the bankrupt, that they claimed no lien upon or interest in any of the assets of the bankrupt estate, that neither the trustee nor the creditors of the bankrupt were interested in the controversy of the intervenors, that the res sought to be reached by the intervenors was not in the possession of the bankrupt court, *we are led to the (425) conclusion that the bankruptcy court had no jurisdiction to determine the controversy.*

"In view of this conclusion, we are precluded from considering the other several interesting questions raised by the parties to this appeal.

"The former opinion of this court is withdrawn.

"The order of the trial court is reversed, with instructions to dismiss the petition in intervention for lack of jurisdiction."

IX.

IT IS AN ATTEMPT TO ENFORCE SPECIFIC PERFORMANCE OF THE ALLEGED AGREEMENT (VOID AS HEREIN SHOWN) BETWEEN TWO CREDITORS BY WHICH IT IS SOUGHT TO REACH DECLARED DIVIDENDS IN THE HANDS OF THE TRUSTEE.

This is a controversy in which the bankrupt estate has no interest; also one in which the general creditors, as a class, have no interest; also one in which the trustee in his official capacity has no interest except as being stakeholder; and one in which the bankruptcy court has no interest. The bankruptcy court, therefore, exceeded its jurisdiction in making the order; it is appealable under section 24(a), and this court should deny the motion to dismiss the appeal; but we contend this court should retain jurisdiction for the purpose of deciding that the lower court had no jurisdiction, and should reverse the orders and judgment appealed from, and order said court to dismiss the proceeding.

See:

Nixon v. Michaels, 38 Fed. 2, 420.

In re Henrie v. Henderson, 145 F. 316, the case was in many respects analagous to the case at bar, and the court said:

> *"It is a controversy which does not in the slightest degree affect the creditors of J. B. Henderson, the bankrupt, nor is the trustee in any*

wise affected. Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel specific performance of a contract relating to the sale of the land. There is no provision which gives the bankruptcy court jurisdiction to hear and determine controversies of this kind. The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted."

X.

THE BANKRUPTCY COURT IS A COURT OF LIMITED JURISDICTION; AND WHERE THE CONTROVERSY DOES NOT PERTAIN TO THE ADMINISTRATION OF THE ESTATE — THE BANKRUPT ESTATE NOT BEING INTERESTED — THE CREDITORS AS A WHOLE NOT BEING INTERESTED — THE BANKRUPTCY COURT HAS NO JURISDICTION TO DECIDE THE CONTROVERSY; AND RESORT MUST BE HAD TO ANOTHER FORUM.

In *Nixon v. Michaels,* 38 Fed. 2d. 420, the court on this subject said:

"The appellate court reversed the decree on the ground that the bankruptcy court had no jurisdiction. It said:

"The first question presented for our consideration is as to the jurisdiction of the bankrupt court to hear and determine the controversy between the real parties to this cause. The subject-matter of the suit is one of equitable cognizance purely. The District Court does not possess the general power to entertain a suit in equity, and, unless the bankrupt act has conferred upon it jurisdiction to entertain a plenary suit in equity, such a suit cannot be maintained. . . . *The jurisdiction of the District Court, as granted by the bankruptcy act, is unquestionable bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceedings.* . . .

"The controversy involved in this suit is not one relating to the collection and distribution of the bankrupt's estate.

"It is not a controversy with reference to property in the actual possession of the bankrupt court, or where it has been taken from the possession of its trustee or receiver without its authority. It is not one arising in the bankruptcy proceedings in reference to property subject to distribution to the general creditors of the bankrupt, or one where, by the nature of the controversy, power is conferred on the court to determine conflicting liens, *or the validity and priority of liens between secured creditors. This is an independent contro-*

versy between third parties who claim equities, as between themselves, in certain property of the bankrupt, which is not in the possession of the trustee, or a part of a fund for distribution among the general creditors of the bankrupt." (Italics ours.)

XI.

CONSENT CANNOT CONFER JURISDICTION WHERE THERE IS NONE

Nixon v. Michaels, supra;
Bardes v. Hawarden, 178 U. S. 524;
Henrie v. Henderson, 145 Fed. 316;
Nelson v. Svea, 178 Fed. 136;
Re Hollins, 229 Fed. 349;
Jones v. Kansas, 1 Fed. 2d 649;
Re Judith, 5 Fed. 2d 307.

XII.

WHERE THE COURT HAS NO JURISDICTION TO ENTERTAIN THE "CONTROVERSY"; THE COURT ITSELF WILL AT ANY POINT IN THE PROCEEDINGS RAISE THE QUESTION AND DISMISS THE ACTION (NOT DISMISS THE APPEAL).

Nixon v. Michaels, 38 Fed. 2d 420;
M. C. Ry. Co. v. Swain, 111 U. S. 379;
C. B. & Q. Ry. Co. v. Willard, 220 U. S. 413;
B. & O. Ry. Co. v. Parkersburg, 268 U. S. 365;
Highway v. McClelland, 14 Fed. 2d 406.

XIII.

ONE OF THE REASONS FOR DENYING THE RIGHT OF GARNISHMENT OF BANKRUPT DIVIDENDS; AND IN DENYING THE RIGHT OF THE THIRD PARTIES TO LITIGATE A CONTROVERSY IN WHICH THE BANKRUPTCY ESTATE IS NOT INTERESTED, IS THAT THE BANKRUPTCY LAW REQUIRES THE DIVIDENDS TO BE PAID WITHIN TEN DAYS AFTER BEING DECLARED, AND SUCH A PROCEEDING WOULD PREVENT THAT LAW FROM BEING CARRIED INTO EFFECT.

In this case the dividends are declared, and the payments thereof are prevented by the so-called "subrogation."

Priestly v. Hilliard, 187 Fed. 784 (California case);

Re Kolsaat, 14 Fed. 833.

In Re American Telephone Co., 211 Fed. 88, this was a proceeding in the Seventh Circuit, in which, by order of court, the trustee was permitted to be garnisheed by a writ from the state court, and at page 90 the court says:

> *"The effect is to inject into the bankruptcy proceeding a suit to enforce payment of the claim against a creditor of the bankrupt, a matter in which the trustee was not concerned, and one neither covered nor contemplated by the bankruptcy act. . . . Clause 2 of section 47 of the act of July 1, 1898, requires the trustee to 'close*

up the estate as expeditiously as is compatible with the best interests of the parties in interest.' Clause 9 of said section directs the trustee to 'pay dividends within ten days after they are declared by the referee.'"

XIV.

THE APPEAL BEING UNDER SECTION 24a OF THE BANKRUPTCY ACT; THE ENTIRE PROCEEDING BOTH AS TO LAW AND FACTS ARE OPENED AND THE LITIGATION IS A "CONTROVERSY."

Houghton v. Burden, 228 U. S. 161;
Loveland on Bankruptcy, 4th Ed., 826 to 829;
Hewit v. Berlin, 194 U. S. 296;
Knopp v. Milwaukee, 216 U. S. 545;
Coder v. Arts, 213 U. S. 233;
Taylor v. Voss, 271 U. S. 176;
Bryon v. Bernheimer, 181 U. S. 188;
Holden v. Stratton, 191 U. S. 115;
Duryea v. Sternbergh, 218 U. S. 299.

XV.

THAT ALTHOUGH THE REFEREE AND THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN NOR DECIDE THE "CONTROVERSY," (ONLY JURISDICTION TO DISMISS) YET IT IS A "CONTROVERSY" AND IS APPEALABLE UNDER SECTION 24a.

Re Kolsaat, 14 F. 833;
Christmas v. Russell, 81 U. S. 69;

Nixon v. Michaels, 38 Fed. 2d 420;
Bank v. Title Co., 198 U. S. 280;
Harrison v. Chamberlain, 271 U. S. 191.

In *Houghton v. Burden,* 228 U. S. 161, the court said:

> "*Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore an appeal under 24-a, and not under 25-b, General Order . . . VI. made under the latter section and requiring a finding of facts, has no application and the appeal opens up to the whole case as in other equity cases. (Hewit v. Berlin Machine Works,* supra; *Coder v. Arts,* 213 U. S. 223; *Knopp v. Milwaukee Trust Co.,* supra."

At page 194 the court says:

> "*However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; . . . but if the controversy is found to be substantial it must decline to determine the merits and dismiss the summary proceeding.*"

In *Bank v. Title Co.,* 198 U. S. 280, on the question of jurisdiction, the Supreme Court said:

> "*In many cases jurisdiction may depend upon the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go further. And where, in cases like that before us, the court erroneously retains jurisdiction to adjudicate the merits and its action can be corrected on review.*"

May we again say that in justice to litigants that this court cannot know until a hearing on the merits, all the facts on which jurisdiction, or a lack thereof, depends and that, therefore, the motion to dismiss should be denied.

CONCLUSION

It is respectfully submitted that the appeal was properly taken under section 24(a) of the Bankruptcy Act; this being true, the order of the District Court allowing the appeal was all that was necessary. It is further respectfully submitted that the controversy was and is one in which the District Court had no jurisdiction to adjudicate, and that the judgment of the District Court should be reversed with directions to dismiss the suit. That the motion to dismiss the appeal should be denied.

It is further respectfully submitted that should this court finally, upon the consideration of the merits of the case, disagree with our contention, and hold that the District Court had jurisdiction to determine the controversy, then we respectfully submit that the judgment of the District Court was entirely wrong upon the merits, and that its judgment should be reversed. In either event, the motion to dismiss the appeal should be denied.

Respectfully submitted,

EDWIN J. MILLER,
Attorney for Appellants.

No. 8104

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of MARGARET E. TOOEY, a Bankrupt.

MAZIE McLEOD and EDWIN J. MILLER,

Appellants,

vs.

DAN BOONE, a petitioning creditor, and HUBERT F. LAUGHARN, Trustee in Bankruptcy,

Appellees.

Petition for Rehearing

FILED

MAY 20 1936

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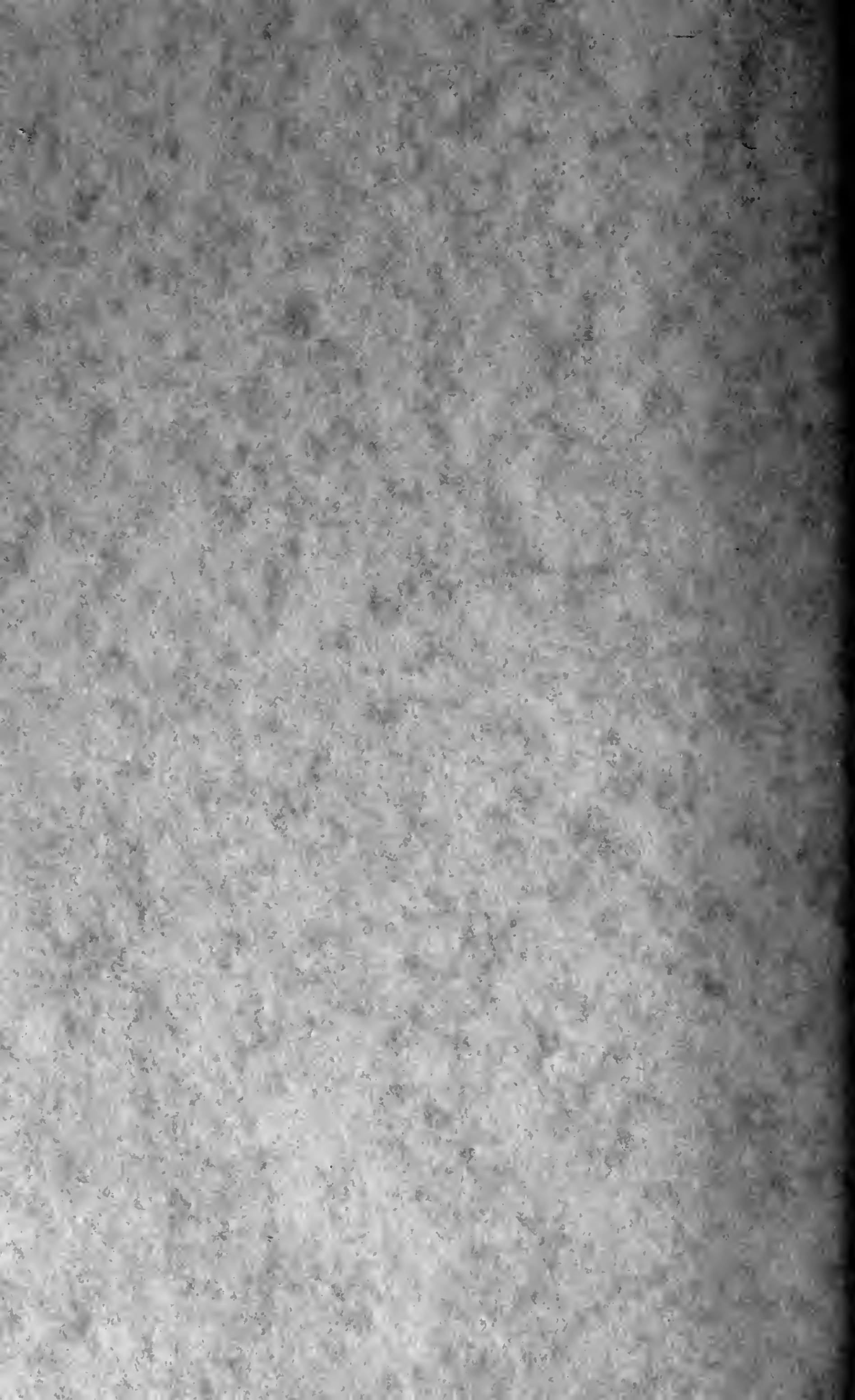

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IN THE

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Appellees.

Petition for Rehearing

To the Hon. Curtis Wilbur, Circuit Justice, and to the Hon. Circuit Justices Garrecht and Matthews, Judges of the Circuit Court of Appeals for the Ninth Circuit:

MAY IT PLEASE THE COURT:

On April 20, 1936, this court filed a written opinion disposing of a motion by appellees made, at the suggestion of the court, to dismiss the appeal. The motion was grounded, and the opinion was based, upon the theory that the proceedings in the lower court, and before the referee, involved only a "proceeding" in bankruptcy; and that it did not involve a "controversy" in bankruptcy.

This court adopted the theory in support of the motion and dismissed the appeal, giving its reason therefor in the last two paragraphs of its opinion. In next to the last paragraph of the opinion, this court, among other things. said:

> "The order of the referee * * * merely gave effect to the consent of the creditors that certain moneys payable to them in due course from the funds of the bankrupt estate should be distributed to Dan Boone instead of to them because of their assignment pro tanto to him. This method of recognizing an assignment was in conformity with general order No. 21, sub. 3, (see Remington on Bankruptcy, sec. 737, 6. 900, note 6) requiring such recognition."

Then the court concludes, from the foregoing, as follows:

> *"It is clear, then, that this is a routine proceeding in bankruptcy, and is not a controversy therein."*

Assuming (but not admitting) that the foregoing was a correct statement of the facts as shown by the record, then the conclusion which the court has drawn therefrom would be the correct conclusion. The difficulty lies in the fact that this court has treated the assignment as incontestable—as valid—as being based on a consideration, and upon consent; whereas in fact there was no consideration and no consent; has overlooked the defenses to it on account of fraud; payment for some items made by other claims; and other infirmities; and this court says, in effect, that it is an "assignment." The truth about it is, that it is not an assignment. This being the case,

the conclusion of the court is based on a wrong premise and therefore the conclusion is wrong.

Assuming there was an *"assignment"* and *"consent"* about which there was no question—a valid assignment and "consent"—which was not contested; and that such assignment and consent was entitled to full credit, without contest, then the opinion of the court dismissing the appeal on such state of facts would be correct. In that event it would be a routine proceeding, such as the court has (erroneously) assumed that it is. But where there is no consent, and assignment; where there is a contest on whether there is an assignment and consent, or not, and when one of appellants never signed or knew of the alleged assignment, and gave no consent; then the entire character of the action is changed, and it becomes a "controversy" in bankruptcy, rather than a "proceeding" in bankruptcy. When it is a "controversy" in bankruptcy the appeal is under 24a. We shall undertake in the following paragraphs to conclusively show that this court is wrong in assuming that the action is not a "controversy" in bankruptcy.

The Character of the Pleadings

Whether the action is what is designated as a *"proceeding"* or a *"controversy,"* sometimes, but not always, may be determined by the character of the pleadings. Here the action was initiated by three different petitions filed by Dan Boone, as follows, February 24, 1933; March 13, 1935; and March 22, 1935. One of these petitions is shown in the printed transcript on file herein (pp. 4 to 21 incl.); in which the specific prayer for the allowance of

the money in controversy is shown at page 10; this petition was filed March 22, 1935 (see p. 21). A part of another petition which was filed February 24, 1933, for the allowance of the same items, and the same money, is shown in the transcript at pp. 27 to 31 incl. (this petition is shown in full in the certified copies presented to this court with the motion to supply missing parts of the record, to which we respectfully invite the attention of this court).

The third petition was filed March 13, 1935, and is not shown in the transcript, but is shown by a certified copy lodged in this court with the motion to supply missing portions of the record on the diminution proceedings. This third petition was based on the same items; asked for the same relief; for the same amount; and for the same money. We respectfully invite attention of the court to all three of these documents.

After the last one of these petitions to recover this money was filed with the referee, he did, on March 23, 1935, send out a notice to the appellants herein requiring them to appear on April 2nd, 1935, at a meeting at the office of the referee, for seven purposes, the seventh of which was to deduct $3856.79 from certain creditors' dividends, and pay the same to Dan Boone (see printed Tr. of Record, p. 32).

To these three petitions these two appellants appeared and filed objections to the alleged subrogation, and on May 29, 1935, filed amended objections which are shown in the printed transcript, (pp. 32 to 35 incl.).

The case was then set down for hearing and was heard, and evidence given, and cross-examination had,

and arguments had, by both parties to the litigation, on four different days, (see printed Tr., p. 39, where a hearing was had on April 30, and another hearing had on May 9th (see p. 40, where another hearing was had on May 13); see p. 40 where a further hearing was had on June 4).

The procedure followed in this case is somewhat similar to the procedure followed in the case of *Clements v. Conyers,* 31 Fed. 2d, 563. In that case the appellees, as in this case, argued that the procedure and the pleadings indicated a summary proceeding and not a controversy; that the entire hearing before the referee was summary in its character; and that where there is a controversy *"the proceeding must be by a plenary suit,"* but the court at page 565 said:

> *"While it is true that in the disposition of administrative matters which, generally speaking, are 'proceedings' rather than 'controversies' arising in bankruptcy, the procedure is summary, it by no means follows that the character of the dispute may be conclusively determined by an examination of the procedure adopted."*

"In other words, the mode of procedure cannot alone determine the nature or character of the dispute. That must be determined by the allegations of the bill or petition, and the averments of the response or answer."

We respectfully suggest that the three petitions in the case at bar were in the nature of petitions, or bills in equity; and the objections, or answer, of these two appellants, as shown at pages 32 to 35 are in the nature of answers; the procedure followed by amendments of the

answer; the setting down for the hearing on four different days before the referee; the continuance from time to time; the offering of evidence in chief, and by cross-examination; the offering of witnesses on the part of both litigants to the controversy is the procedure usually followed in plenary proceedings.

In the above case, in commenting on this very situation, the court said:

> *"Moreover, we are not satisfied that petitioner in the present case proceeded summarily. It is true that he filed a petition and obtained an order on the appellee to show cause. But appellee filed an answer and so described it, and the legal steps from then on were similar to those of the ordinary suit in equity. In other words, the matter being at issue, a day was set for trial, and petitioner offered evidence which was met by defendant's evidence. The court entered what it termed a decree. The facts are not unlike those in Re. Rockford Produce and Sales Co., 275 Fed. 811, where we there held that the procedure in that case was not summary."*

So judging from the above decision, and also by the case in *Re. Rockford,* supra, it appears that the proceeding in the instant case was not "summary"; but was *"plenary"* in its character. In the *Rockford* case last above cited, the court said:

> *"The proceedings here under review, while begun by a petition and rule of court, were from their commencement treated as a suit in equity. The petition was the bill in equity. The reply was designated, and in every way met the requirements of an answer. It was amended; the course followed was such as*

would have been pursued, had the pleader wished to amend an answer. This cause was set down for trial in its order, and when reached was heard in open court, and in the same manner as a suit in equity, that is to say, the petitioner presented his witnesses who were cross-examined by the objecting party or his counsel, and, when the affirmative rested, the defendant presented his testimony. Whether this proceeding was summary or 'plenary,' it is evident that appellant secured a full hearing on an issue over which he and the trustee were in controversy, and the determination was made at appellant's as much as the appellee's request. Under the circumstances we think the record discloses a plenary, rather than a summary, proceeding. In Re. Raphael, 192 Fed. 874, 13 C. C. A. 198."

We think it clear that in the instant case the proceedings took the form of a plenary action both as to the form of petitions or bills filed, and the objections which are in the nature of an answer; the hearing of evidence; and the cross-examinations and the order and judgment entered by the referee all were *plenary* in their nature and strongly indicated *"controversy"* rather than a "routine" proceeding.

It is very much like the case of *Re. Hartzell,* 209 Fed. 775, where at 778 the court in speaking of this subject, said:

"The pleading of the appellant thereof, styled an answer, was in substance an intervening petition claiming affirmative relief in respect of its lien against both the trustees and the appellees. The claim against the trustees, if it had any merit, which

> *is doubtful, became immaterial, as will be seen, and the real controversy is between appellant and appellees over the validity of appellees' mortgage and the priority of their respective liens."*

The appeal in the above entitled action was under 24a. A motion to dismiss was made, because not taken under another section of the statute. The court, after discussing the matter denied the motion to dismiss; recited the nature of the pleadings as indicative a *"controversy,"* and held the proceeding was "plenary" in its nature.

We regard the above authority as applicable in the case at bar; and as strongly tending to show that the opinion of this court in the instant case is wrong. When this court said the order of the Referee merely gave effect to the *"consent"* of the creditors, it assumed as true a disputed question. The consent of these two appellants was never in fact given. One never signed it nor knew of it.

The Character of the Contest Is a "Controversy" In Substance

In addition to the pleadings and course which the contest took in the court below, strongly indicating a "controversy," the substance of the contest itself could be nothing other than a "controversy." A *"controversy"* may arise out of what might, at the initiation of the hearing be deemed a "proceeding," yet when a dispute arises in the proceedings, it becomes a "controversy." In other words, if there were no question about the assignment nor consent (which question this court in its decision, evidently, did not hold in mind, nor that there was a

dispute); under such circumstances it might well be designated as a "proceeding," and then this court's opinion would be correct; but when the petitioner, or complainant, by petition, or by bill in equity, comes into court, and files a bill or petition to enforce a document which is denied; to enforce a document to which infirmities are set up in an affirmative defense (as in *Re. Rockford,* 275 Fed. 811), such as in the case at bar, viz., no consideration; no consent; an attempt to enforce an uncompleted gift; payment already having been made; fraud in obtaining the same; not even signed by appellant Mazie McLeod, nor authorized by her; then these matters are shifted from the mere *"routine"* proceeding such as is indicated in the opinion of this court, in the case at bar, to a real *"controversy,"* such as is indicated in the authorities hereinabove, and hereinafter, cited.

In the case of *Re. Hartzell,* supra, heretofore referred to, the litigation at the beginning was one of the mere "routine" proceedings in the ordinary course of bankruptcy administration. There was 960 acres of land subject to certain liens, mortgages, attachments, taxes, and judgments, and homestead. The trustees filed a petition to have the land sold free from all liens, and that the liens be transferred to the proceeds. The appellant bank filed an answer in which it asked relief against the trustees, and against other appellees. Afterwards the interest of the trustee in the dispute ceased, although he was the original Petitioner; and it became solely a controversy between two sets of creditors, as in the instant case; and although it was initiated as a mere "routine" proceeding in bankruptcy, it ended up in a contest as a *"controversy,"*

and the motion to dismiss the appeal was denied. We insist that the reasoning of the above case, as applied to the facts in the case at bar, would result here as it did in that case, viz., a ruling denying the motion to dismiss the appeal.

That the contest in the case at bar is not a "routine" proceeding is strongly indicated in the case last above cited by this language:

> *"The claim against the trustees, if it had any merit, which is doubtful, became immaterial, as will be presently seen, and the real controversy was between appellant and appellees over the validity of appellee's mortgage, and the priority of their respective liens. It is important to note that appellant was not asserting its mortgage lien as an incident to the presentation of the allowance of its claim against the general estate. * * * So far as could be in the nature of things, there was a separate, independent assertion of its mortgage."*

Applying that language to the case at bar, it will be noted that Dan Boone was not asserting his right to the money in controversy as an incident to any claim which he had against the estate, for his claim against the estate for that same money had been denied by the Referee in the three of his petitions. So he came in, in three independent petitions, and asked to have money appropriated from these two appellants from their dividends, which were not then allowed; but were allowed some two months later (see certified copy on file); and while the trustee was and is the stakeholder of this money, and is an appellee, because he has the funds in his hands, yet the

real controversy is between the creditors, viz., Boone, on the one part, and the two appellants on the other part; just as it was in the *Hartzell* case, supra, in which the court in that case further said:

> *"In other words it became manifest nothing would be left for the general estate, and it could be of no interest to the trustees or the general estate whether a deficiency of claim if the application of the proceeds of the mortgaged realty should be that of appellant or that of appellees; so there was then disclosed a 'controversy' in which the trustees had no real interest, but which was between individual lien holders. The district court then proceeded to try the issue between appellant and appellees.* * * *"
>
> "* * * *The case has the substantial aspect of an independent controversy. There is a distinct alignment of parties, the pleadings unconnected attempt ordinary assertion for the allowance of a demand against an estate.* * * * *Appellant's pleading was in substance and in form, an intervention in equity. The trial court proceeded in a plenary, independent controversy, and filed its conclusion and decree."*

How much like the proceeding in the case at bar is the above? The general creditors, as a whole, are not interested in the dispute. The trustee is only incidentally interested in it as a stakeholder. The bankrupt estate of Margaret Tooey is not interested at all. It is an independent controversy between persons, and which is not a part of the bankruptcy proceeding, the bankruptcy estate is not increased nor diminished hereby, and therefore comes within the definition of a *"controversy"* in the nature of an intervention in equity, by Dan Boone trying

to assert the validity of a document which is denied, and its regularity is challenged; and the suit has none of the aspects of a *"routine"* proceeding in bankruptcy. Under the above authority, therefore, we respectfully challenge the correctness of the decision of this court in the instant case, and we again say that in order to arrive at the conclusion which this court arrived at in dismissing this appeal, it assumed that there was both consent and an assignment. This assumption is disputed; and in order for this court to determine whether there is consent and an assignment or not, which it can enforce, it must first determine the *"controversy"* existing, some of the reasons for denying the validity of the alleged assignment, are set out in our objections, and in our brief, in opposition to the motion to dismiss the appeal.

That part of this court's opinion, therefore, which says that the order appealed from merely gave effect to the *"consent"* of the creditors to the *"assignment"* is wrong. Whether there was a consent or not; and whether there was a valid assignment or not, is disputed, and this determination gives rise to a *"controversy"* (see above authorities).

Therefore, there being no *"assignment,"* as in this court's opinion assumed, and there being no *"consent,"* there is no *"routine,"* but a decided *"controversy"* proceeding.

A "Routine" Proceeding May Develop Into a "Controversy"

In this respect the contest is not unlike that cited under point XIII of our brief on file herein, and like the con-

troversy in *Re. American Telephone Co.,* 211, Fed. 88, wherein the court said:

> *"The effect is to inject into the bankruptcy proceeding a suit to enforce payment of the claim against a creditor of the bankrupt. A matter in which the trustee was not concerned; and one never covered nor contemplated by the bankruptcy act."*

Is not this language very apt and very descriptive of the situation in the case at bar? The setting is that Dan Boone, a creditor, has by his petitions in the nature of bills in equity, injected into the bankruptcy proceeding a suit to enforce payment of a claim against creditors of the bankrupt, *"a matter in which the trustee was not concerned, and one neither covered nor contemplated by the bankruptcy act?"*

Is it not in this respect like the case of *Henrie v. Henderson,* 145 Fed. 316, quoted from at page 16 of our brief, on file, in which the court said:

> *"Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel a specific performance of the contract relating to the sale of land, but here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt.* * * *"

Is not the above language descriptive of the contest at bar, in that it appears that Dan Boone, by his three petitions seeks specific performance of what he alleges is the agreement to compel payment of the $3856.79? Is it not a suit on that alleged, but denied contract, in which the bankrupt estate is not interested? And is not the above

language pertinent, wherein it says the parties who are contending about the matter which is in no way related to or connected with the affairs of the bankrupt? We have heretofore stated that the bankruptcy estate proper, is not interested in the contest; the trustee is not interested in the contest, except as a stakeholder; and the general creditors of the estate are not interested in the controversy. It therefore appears to be a private contest in the nature of a bill in equity, and where the assignment is denied, and its validity is challenged, and the "consent" suggested by this court is denied, then it becomes a "controversy," although it may have been initiated as a "routine." We respectfully submit that the appeal under 24a was properly taken.

The Face of Petitions, of the Document, With the Objections, a "Controversy"

By a mere inspection of the face of the petitions and of the document itself, this court will see that the contest concerns the following points and others:

(a) The document on its face purports no consideration;

(b) The document purports to be voluntary;

(c) The document purports the making of a proposed gift in the future;

(d) The document is not signed by Mazie McLeod, nor authorized by her;

(e) There is no consent, and no assignment (see our brief on file, pp. 9-11).

By reference to the Petitions of Dan Boone, the objections and oral testimony, the court will see there was

another point of contest, viz., that there was fraud in the obtaining of the document; it was never in fact delivered. The question of whether it is a *"controversy"* must be determined by the allegations of the Petition, and response. *Clements vs. Congress,* supra, at page 565.

Therefore, the determination of these disputed questions between the two sets of creditors, in which the estate itself is not interested, and the creditors as a whole not interested, takes the case out of the "routine" definition, and places it in that class of cases which are defined in the above decisions, and many others as a "controversy." A number of these decisions are cited in our brief already on file, to which we respectfully refer.

Conclusion

We feel, therefore, that the court in deciding to dismiss this appeal, did not hold in mind that which may have been initiated as a "routine" proceeding and a "summary" proceeding, may be the very nature of the later developments become a "controversy"; and therefore appealable under 24a. This is the purport of the decisions we have cited; that is what we feel that this court overlooked in its decision. Upon this we feel that we are entitled to a rehearing.

If appellants are right in this, our contention, the case is properly appealable under 24a, and there should be a hearing granted herein, and the motion to dismiss the appeal should be denied.

Very respectfully submitted,

EDWIN J. MILLER
Attorney for Petitioners and Appellants.

Certificate

Edwin J. Miller, Counsel for Appellants in the foregoing entitled action, represents to the Honorable Circuit Court of Appeals that the Petition for Rehearing herein merits the attention of the Court, and that same is not interposed for the purpose of delay.

....

Edwin J. Miller.

Dated May 19, 1936.

No. 8116

6

United States Circuit Court of Appeals

For the Ninth Circuit.

LAU HU YUEN, alias LAU CHOCK WAH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

FILED

MAR 18 1936

PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8116

United States
Circuit Court of Appeals
For the Ninth Circuit.

LAU HU YUEN, alias LAU CHOCK WAH,
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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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LAU HU YUEN alias LAU CHOCK WAH.

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Stangenwald Building,
Honolulu, T. H. [1*]

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In the United States District Court
for the Territory of Hawaii.

Deportation No. 35.

UNITED STATES OF AMERICA,

vs.

LAU HU YUEN alias LAU CHOCK WAH.

CLERK'S STATEMENT.

Time of Commencing Suit:
December 10, 1934, Complaint filed.

Names of Original Parties:
United States of America, Plaintiff; Lau Hu Yuen alias Lau Chock Wah, Defendant.

Date of Filing Pleadings:
December 10, 1934, Complaint, Warrant issued.

Date of Filing Decision:
April 8, 1935, Decision filed.

Date of Filing Judgment:
April 9, 1935, Judgment filed.

Proceedings in the above entitled matter were had before the Honorable Edward K. Massee, District Judge.

Dates of Filing Appeal Documents:
April 18, 1935, Cost Bond.
June 21, 1935, Petition for Appeal, Assignment of errors, Order Allowing Appeal, Praecipe, Citation issued. [2]

CERTIFICATE OF CLERK AS TO THE ABOVE STATEMENT.

The United States of America,
Territory of Hawaii—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties; the several dates when respective pleadings were filed; the date of the filing of the decision and judgment; the name of the judge presiding and the dates when appeal documents were filed and issued in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of January, A. D. 1936.

[Seal] WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
Territory of Hawaii. [3]

In the United States District Court for the Territory of Hawaii.

October Term 1934.

Deportation No. 35.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAU HU YUEN alias LAU CHOCK WAH,

Defendant.

COMPLAINT FOR DEPORTATION UNDER CHINESE EXCLUSION ACT.

United States of America,
District of Hawaii—ss.

On this 10th day of December, A. D. 1934, before me, EDWARD K. MASSEE, Judge of the United States District Court for the Territory of Hawaii, personally appeared FRED E. ARNOLD, who, by me being first duly sworn, on oath, deposes and says as follows:

That he is a duly qualified and acting Immigration Inspector of the United States of America for the Territory of Hawaii; that LAU HU YUEN alias LAU CHOCK WAH is a person of Chinese descent, within the United States and within the jurisdiction of the United States District Court for the Territory of Hawaii; that the said LAU HU YUEN alias LAU CHOCK WAH, on or about the 30th day of April, 1923, did unlawfully obtain admission into the United States at the Port of Hono-

lulu by false and fraudulent representations and claim of United States citizenship made before the Immigration Officials at the Port of Honolulu; and that the said LAU HU YUEN alias LAU CHOCK WAH is not lawfully entitled to be or remain in the United States, in violation of the Acts of Congress in such case made and provided. [5]

WHEREFORE, this affiant and complainant prays that a warrant be issued directing the Marshal of this District, or his Deputy, to arrest the said LAU HU YUEN alias LAU CHOCK WAH and bring him before this Honorable Court in order that he may be dealt with according to law and statutes in such case made and provided.

/s/ FRED E. ARNOLD

Subscribed and sworn to before me this 10th day of December, A. D. 1934.

[Seal] EDWARD K. MASSEE
Judge, United States District Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 10, 1934. [6]

[Title of Court.]

THE PRESIDENT OF THE UNITED STATES OF AMERICA;

To the Marshal of the United States for the District and Territory of Hawaii, and to his Deputies, or any or either of them, Greeting:

WHEREAS, Complaint in writing, on oath, has been made to the undersigned, Judge of the

United States District Court for the Territory of Hawaii, at Honolulu, charging that LAU HU YUEN alias LAU CHOCK WAH, is a person of Chinese descent and is now within the Territory of Hawaii; that the said LAU HU YUEN alias YAU CHOCK WAH has no lawful right to remain in the United States, and praying that a Warrant for the arrest of the said LAU HU YUEN alias LAU CHOCK WAH be issued and that he be arrested and brought before this Court and upon a hearing being had that he be duly adjudged to be unlawfully in the United States, and that the proper order for his deportation be made and entered and that he may be otherwise dealt with according to law and the statutes in such case made and provided.

NOW, THEREFORE, you are hereby commanded to arrest the said LAU HU YUEN alias LAU CHOCK WAH and him safely keep, so that you bring him before this Court for a hearing upon the said Complaint, and in order that the said LAU HU YUEN alias LAU CHOCK WAH may be dealt with according to law. And have you then and there this writ, with a return of your doings hereon. [7]

WITNESS, my hand and seal at Honolulu, Territory of Hawaii, this 10th day of December, 1934, and of the independence of the United States the one hundred and fifty-ninth.

[Seal] EDWARD K. MASSEE

Judge, United States District Court, Territory of Hawaii.

MARSHAL'S RETURN.

Receiver this WARRANT on the 10th day of December, A. D. 1934, and executed the same by arresting the within-named LAU HU YUEN alias LAU CHOCK WAH, at Honolulu, T. H., on the 10th day of December, 1934, and have his body now in court as within I am commanded.

OTTO F. HEINE
United States Marshal,
District of Hawaii.
(s) THOMAS R. CLARK
Deputy U. S. Marshal.

Marshal's Crim. Docket
No. 10891
Court No. 35
Fees $2.00
Expenses
Total $2.00 [8]

PROCEEDINGS AT PLEA, BOND FIXED AT $2,500.00

From the Minutes of the U. S. District Court, for the Territory of Hawaii

Monday, December 10, 1934.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendant without counsel. The de-

fendant was duly arraigned and entered a plea of not guilty as charged. The Court ordered bond fixed at $2,500.00. [9]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii
Wednesday, March 13, 1935

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. Ernest J. Hover of the Immigration Department, and also came the defendant with Mr. Charles H. Hogg, his counsel. This case was called for trial. Mr. Hover made the opening statement. W. G. Strench, District Director of Immigration and Naturalization at the Port of Honolulu, was called and sworn and testified on behalf of the United States. U. S. Exhibit "A-1", testimony of Lau Hu Yuen before a Board of Special Inquiry at Honolulu, Hawaii, on April 28, 1923, in re Lau Hu Yuen, was marked for identification. U. S. Exhibit "A-2", testimony of Lau Kwock Leong before the Board of Special Inquiry at Honolulu, Hawaii on April 28, 1923, in re Lau Hu Yuen, was marked for identification. U. S. Exhibit "A-3", testimony of Lau Kwai before Board of Special Inquiry at Hono-

lulu, Hawaii on April 28, 1923 in re application of Lau Hu Yuen, was marked for identification. U. S. Exhibit "A-4", testimony of Wong Pau Hin before the Board of Special Inquiry at Honolulu, Hawaii, on April 28, 1923, in re application of Lau Hu Yuen, was marked for identification. U. S. Exhibit "A-5", decision of Board of Special Inquiry at Honolulu, Hawaii on April 28, 1923 in re application of Lau Hu [11] Yuen for admission as Hawaiian born citizen, was marked for identification. U. S. Exhibit "B", application of Lau Hu Yuen for a Chinese certificate of identity on May 3, 1923 and receipt for same, was marked for identification. U. S. Exhibit "C" application of Lau Hu Yuen to U. S. Immigration Service at Honolulu, T. H. on October 20, 1934 for certificate of Hawaiian Islands citizenship, was marked for identification. Ernest J. Hover, of the Immigration and Naturalization Service, was called and sworn and testified on behalf of the United States. Fred E. Arnold, Immigration Inspector, Chinese Division, Immigration Service, was called and sworn and testified on behalf of the United States. Mr. Arnold was withdrawn and Mr. Hover took the stand. Mr. Arnold resumed the witness stand. Lee Kam Chin was called by the government to the witness stand. Mr. Patterson appeared for this witness and stated to the Court that he would have to advise this witness against testifying as to certain evidence in case which might tend to incriminate him as there is a similar charge

filed by the government against this witness, now pending in this court, but that this witness would be willing to testify provided the government would dismiss the pending charge against him with prejudice. Mr. E. C. Peters, who appeared for two other witnesses summoned by the government in this case and who had similar charges pending in this court against them, also joined in the statement made by Mr. Patterson. The Court ordered that this case be continued to Monday, March 18, 1935 at 9 a. m. [12]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii
Monday, March 18, 1935

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. E. J. Hover, of the Immigration Service. Mr. Charles H. Hogg appeared with the defendant herein. Mr. E. C. Peters appeared for three witnesses summoned in this case. Mr. Patterson appeared for Lee Koon Chin, summoned as a witness in this case. Mr. Peters addressed the Court giving his contention why the three witnesses summoned in this case by the government should not testify as to certain evidence which might tend to incriminate

them, citing cases in support of his contention and that they should be granted their claim of privilege. Mr. Moore addressed the Court taking an opposite view of the one expressed by Mr. Peters and moved that the Court instruct these three witnesses to testify in this case. Mr. Patterson also expressed his view in so far as the witnesses in this case are concerned and that these witnesses should be protected by the fifth amendment of the Constitution of the United States. The Court's ruling on this question was reserved to Tuesday, March 19, 1935 at 1:30 p. m. [13]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii
Tuesday, March 19, 1935.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. E. J. Hover, of the Immigration Department, and also came the defendant with Mr. C. H. Hogg, his counsel. Mr. E. C. Peters appeared for certain witnesses. Mr. Patterson appeared for certain witnesses. This case was called for ruling as to the testimony of certain witnesses. The Court stated that there was nothing before the Court at this time and ordered that trial of this case proceed.

Mr. Moore renewed his offer of proof, stating his offer. Mr. Hogg made an objection. The offer of proof was denied and an exception noted by Mr. Moore. U. S. Exhibit 1, heretofore marked for identification as U. S. Exhibits "A-1", "A-2", "A-3", "A-4" and "A-5", was admitted in evidence, marked and ordered filed. U. S. Exhibit #2, heretofore marked for identification as U. S. Exhibits "B" and "D", was admitted in evidence, marked and ordered filed. U. S. Exhibit #3, formerly marked for identification as U. S. Exhibit "C" was admitted in evidence, marked and ordered filed. The Court ordered that this case be continued to March 20, 1935 at 9 a. m. for further trial. [14]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii

Monday, March 25, 1935.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorneys, Mr. Willson C. Moore, and Miss Jean Vaughan, and also came Mr. Ernest J. Hover of the Immigration and Naturalization Department. The defendant appeared with Mr. Charles H. Hogg, his counsel. This case was called for further trial. George Hoon Leong was called and

sworn and testified on behalf of the United States. U. S. Exhibit #4, permit for disinterment, was admitted in evidence, marked and ordered filed. Luke Chan was called and sworn and testified on behalf of the United States. Mary Hester Lemon, registrar general, Board of Health, was called and sworn and testified on behalf of the United States. Jessie Leong Ho was called and sworn on behalf of the United States. Lee Kau was called and sworn and testified on behalf of the United States. Fred E. Arnold, immigration inspector, was called and sworn and testified on behalf of the United States. U. S. Exhibit "E", testimony of Lau H. Yuen, November 1, 1934, and U. S. Exhibit "F", testimony of Lau H. Yuen, November 27, 1934, were marked for identification. The Court ordered that this case be continued to March 26, 1935 at 9 a. m. for further trial. [15]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii

Tuesday, March 26, 1935.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. E. J. Hover of the Department of Immigration and Naturalization. The defendant appeared

with Mr. Charles H. Hogg, his counsel. This case was called for further hearing. Tom Hoon, official Chinese interpreter, U. S. Immigration Service, Honolulu, was called and sworn and testified on behalf of the United States. Nellie Holland, stenographer, U. S. Immigration Service, Honolulu, was called and sworn and testified on behalf of the United States. Mr. Moore's motion to offer in evidence U. S. Exhibits "E" for identification was objected to by Mr. Hogg, the objection was sustained by the Court. Miss Holland was temporarily withdrawn from the witness stand and Tom Hoon was recalled to testify for the government. Miss Holland then resumed the witness stand. Mildred Beese, clerk and stenographer, U. S. Immigration Service, Honolulu, was called and sworn and testified on behalf of the United States. Leong Wah Hin, former treasurer, Manoa Chinese Cemetery Association, was called and sworn and testified on behalf of the United States. U. S. Exhibit "G", large book containing burial records of Manoa Chinese Cemetery Association, was marked for identification. Chun Hoon, merchant, was called and sworn and testified on behalf of the United States. U. S. Exhibit "H", large iron box containing records of Manoa Chinese Cemetery Association, was marked for identification. U. S. Exhibit "I", large iron box containing records of Manoa Chinese Cemetery Association, was marked for identification. The Court then ordered that this case be continued to

Wednesday, March 27, 1935 at 9 a. m. for further hearing. [16]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii
Wednesday, March 27, 1935.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. E. J. Hover of the Department of Immigration and Naturalization, and also came the defendant with Mr. Charles H. Hogg, his counsel. This case was called for further hearing. Leong Wah Hin was recalled to the witness stand. Chun Hoon was recalled and testified further on behalf of the United States. Lee Kau, alias Lee Chee Chang, was recalled by the government. Gon Sam Mue, Chinese interpreter, U. S. Immigration Service, Honolulu, was called and sworn and testified on behalf of the United States. The Court then ordered that this case be continued to Thursday, March 28, 1935. [17]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii

Thursday, March 28, 1935.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. E. J. Hover, of the Department of Immigration and Naturalization, and also came the defendant with Mr. C. H. Hogg, his counsel. This case was called for further hearing. A motion by Mr. Moore to admit in evidence a book containing burial permit studs including the burial permit stub of one Leong Tom Shee, burial plot No. 58, was granted by the Court over the objection of Mr. Hogg. This book, with a typewritten translation into English of the burial permit stub of Leong Tom Shee was marked as U. S. Exhibit #5. The clerk was instructed by the Court to initial (W.F.T.) the top of this particular stub and the translation. A motion by Mr. Hogg to dismiss proceedings and discharge the defendant was entered. Mr. Moore entered an objection. The motion was denied. An exception was allowed. The Court then ordered that this case be continued to 2 p. m. this day. At 2 p. m. Edmund H. Hart, assistant librarian, archives of Hawaii, was called and sworn and testified on behalf of the United States. Lau Hu Yuen was called and sworn and testified on his own behalf. The Court

then ordered that this case be continued to Friday, March 29, 1935 at 9 a. m. [18]

PROCEEDINGS AT FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii

Friday, March 29, 1935.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and Mr. E. J. Hover of the Department of Immigration and Naturalization and also came Mr. C. H. Hogg, counsel for the defendant herein and with said defendant. This case was called for further hearing. The defendant resumed the witness stand. The defense then rested. Nellie Holland was recalled by the government. Tom Hoon was recalled by the government. The government then rested. Both sides rested. Argument was had by Mr. Moore. Argument was had by Mr. Hogg. Further argument was had by Mr. Moore. This matter was taken under advisement. Upon motion of Mr. Moore the Court ordered that all exhibits in the custody of the clerk which had not been offered in evidence be returned. [19]

U. S. EXHIBIT No. 1

U. S. Department of Labor
Immigration and Naturalization Service

Dep. #35
U. S. Exhibit "A-1"
Marked for identification
3-13-35

U. S. v. LAU HU YUEN
Deportation #35

GOVERNMENT'S EXHIBIT
No. A-1
Exhibits A1-2-3-4 & 5
admitted as U. S. Exhibit #1
3-19-35

IMMIGRATION AND NATURALIZATION FILE.

Subject: TESTIMONY OF LAU HU YUEN, file 4382/1910, before a Board of Special Inquiry, port of Honolulu, T. H. on April 28, 1923. [20]

U. S. DEPARTMENT OF LABOR
IMMIGRATION SERVICE

File No. 4382/1910 Port of Honolulu, T. H.

RECORD OF BOARD OF SPECIAL INQUIRY

In the Matter of the application of
LAU HU YUEN
Alleged Hawaiian born
Ex s/s PRES. PIERCE 4/27/23
For admission to the
UNITED STATES.

Convened—4-28-23.

Chairman—HARRY B. BROWN.

Member—MARTHA MAIER.

Member—LOUIS CAESAR.

Interpreter—HEE SOU HOY.

Typist—MARTHA MAIER.

Held for Special Inquiry by Inspector RICHARD L. HALSEY.

APPLICANT, sworn by Chairman, testifies:

Q. Have you secured an attorney to represent you in the hearing that is about to commence?

A. No.

Q. Do you expect to present witnesses to establish your right to admission to the United States?

A. Yes.

Q. During the course of this hearing it may be necessary for some officer of this service to take testimony outside of this office, or go to some other Governmental office or place and search records. Are you willing that this should be done and have

the testimony taken in this manner, and also have the report of the search of the records considered by this Board of Special Inquiry?

A. Yes.

Q. Do you desire a friend or relative present at this hearing?

A. No.

Q. What dialect do you speak?

A. Heong San.

Q. Can you understand the interpreter?

A. Yes.

Note: Presents affidavit setting forth he was born in Hawaii.

Q. Name and age?

A. Lau Hu Yuen alias Lau Chock Wah, 26.

Q. Date of your birth?

A. 7th month 14th day KS 23.

Q. Where were you born?

A. Honolulu—Beretania Street near Nuuanu—

Q. How do you know that?

A. My father told me often.

Q. Occupation?

A. Went to school from 10 to 20; since then been working in a dry goods store at Sheackee.

Q. Name of the store?

A. Sing Chong.

Q. Name of your wife?

A. Chun She, 26.

Q. How many children have you?

A. Two sons—Lau Bung Kan, 6; Lau Bung Sun, 3. [21]

Q. Your wife's parents living?

A. Yes, father, Chun Loy—mother, Wong She.

Q. How many brothers and sisters?

A. One brother and one sister—Chun Bung, sister, Yee Mui—both at Chung Tow village.

Q. Your parents living?

A. My father is living—mother is dead.

Q. Names of your father?

A. Lau Ah Chew alias Lau Chun Ng, 65.

Q. What is he doing in China?

A. Rice planter.

Q. What did he do in Hawaii?

A. Dressmaker.

Q. His parents living?

A. They are dead—father, Lau Ah Sing—mother, Chong She.

Q. How many brothers and sisters has your father?

A. None.

Q. Name of your mother?

A. Tom She.

Q. When did she die?

A. Died in Hawaii in KS 25 5th month 12th day.

Q. Where are her remains?

A. Taken to China in CR 6.

Q. Your father marry again?

A. No.

Q. What is your home village?

A. Lung Tow Wan.

Q. How large a place is that?

A. Little over 1,000 houses.

Q. When did you go to China?

A. When I was 2 years old—Doric—Ks 25—10th month 22nd day.

Q. Who went with you?

A. My father, that is all.

Q. How many brothers and sisters have you?

A. None.

Q. Who is there in Hawaii whom you know and can identify?

A. Lau Yun alias Lau Kwock Leong; Lau Kwai, Wong Pau Hin, that is all.

Q. What village are these men from?

A. Lau Kwai and Lau Yun are from Lung Tow Wan the other from Bark Mee In.

Q. When did you see these men last?

A. Saw Lau Yun one year ago; saw Lau Kwai 2 years ago; Wong Pan Hin 2 or 3 years ago.

Q. What family has Lau Yun?

A. Wife, Pang She, one son, Lau Ah Jong, 8.

Q. What family has Lau Kwai?

A. Wife, Ho She; one son and one daughter Lau Kum Ping, 23; Yee Mui, 4.

Q. When did you see Wong Pan Hin last?

A. 2 or 3 years ago.

Q. What family has he in China?

A. Father and mother and grandparents—no wife.

Q. Anything more to say?

A. No.

(Chinese Characters) [22]

4382/1910 4-28-23

Dept.35 part of Exh. #1
U. S. Exhibit A-2
marked for identification
3-13-35

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

U. S. v. LAU HU YUEN
Deportation #35

GOVERNMENT'S EXHIBIT
No. A-2

IMMIGRATION AND NATURALIZATION FILE

Subject; TESTIMONY OF LAU KWOCK LEONG, supporting witness for LAU HU YUEN, before a Board of Special Inquiry, Honolulu, T. H., April 28, 1923. U. S. Immigration File 4382/1910. [23]

Witness sworn, testifies: CR 11942 verified 5/6/03—12/12/21.

Name and age?

A. Lau Yen alias Lau Kwock Leong, 58.

Q. Where were you born?

A. Lung Tow Wan village—China.

Q. When did you first come to Hawaii?

A. KS 13.

Q. Ever been back?

A. Been back three times—KS 18, KS 29, 1921.

Q. You married?

A. Yes, wife, Pang She, in China.

Q. How many children have you?

A. Two daughters and one son,—Jong Kun the son, 9 years old; Dai Mui, 29; Yee Mui, about 20.

Q. What is the purpose of your visit here today?

A. Witness for Lau Hu Yuen.

Q. Has he any other name?

A. Lau Chock Wah his married name.

Q. How old?

A. 26.

Q. Where was he born?

A. Beretania street near Nuuanu.

Q. How do you know that?

A. I saw him here before about 2 or 3 months after he was born.

Q. Is he married?

A. Yes, wife, Chun She.

Q. Has he any children?

A. Two sons—Bung Kan, about 7; Bung Sun, 3.

Q. What has the applicant been doing in China?

A. Working in a dry goods store at Sheackee city.

Q. Applicant's parents living?

A. His father is living—mother is dead.

Q. Name of the father?

A. Lau Chew alias Lau Chun Ng.

Q. What is he doing in China?

A. Rice planter.

Q. What did he do in Hawaii?

A. Dressmaker.

Q. He have any brothers or sisters?

A. No.

Q. Name of the applicant's mother?

A. Tom She died at Beretania street near Nuuanu in KS 25 the 5th month.

Q. Applicant's father marry again?

A. No.

Q. What is the applicant's home village?

A. Lung Tow Wan.

Q. When did the applicant go to China and who went with him?

A. His father went with him in KS 25 10th month on the ss Doric.

Q. How many brothers and sisters has the applicant?

A. None.

Q. Would you know the applicant if you should see him now?

A. Yes.

IDENTIFICATION IS MUTUAL.

Q. Anything more to say?

A. No.

(Chinese characters) [24]

4382/1910 4/30/23

Dept. 35 Part of Exh. #1

U. S. Exhibit
A-3
marked for identification
3-13-35

U. S. v. LAU HU YUEN
Deportation #35

GOVERNMENT'S EXHIBIT
No. A-3

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: TESTIMONY OF LAU KWAI, as supporting witness for LAU HU YUEN before a Board of Special Inquiry, Honolulu. T. H., Apr. 28, 1923. U. S. Immigration File 4382/1910 [25]

Witness sworn, testifies: CR 6357 verified 8/15/11 and 12/8/19.

Q. Name and age?

A. Lau Kwai alias Lau Kai Leong, 47.

Q. Where were you born?

A. Lung Tow Wan.

Q. When did you first come to Hawaii?

A. KS 17.

Q. Ever been back?

A. Three times—KS 25—10th month on the Doric; St. 3 and CR 8.

Q. You married?

A. Yes, wife, Ho She, in China; one son and one daughter Kum Ping, 23; Yee Mui, 4.

Q. What is the purpose of your visit here today?

A. Witness for Lau Hu Yuen.

Q. How old?

A. 26.

Q. Any other name?

A. Chock Wah his married name.

Q. Where was he born?

A. Hawaii—Beretania near Nuuanu.

Q. How do you know that?

A. I saw him a week after he was born.

Q. What has he been doing in China?

A. Work at Sing Chong dry goods store at She-ackee City.

Q. Is he married?

A. Yes, wife, Chun She.

Q. Children?

A. Two sons—Bung Ken, 6; Bung Sun, 3.

Q. His parents living?

A. His father is living in China—Ah Chew alias Chan Hing—mother died in Hawaii, KS 25 about the 5th month Tom She.

Q. Father marry again?

A. No.

Q. What is the father doing in China?

A. Rice planter.

Q. What did he do in Hawaii?

A. Dressmaker.

Q. When did the applicant go to China?

A. KS 25—10th month 22nd day on the ss Doric —I went the same time with him.

Q. How many brothers and sisters has the applicant?

A. None.

Q. Would you know him if you should see him now?

A. Yes.

IDENTIFICATION IS MUTUAL.

Q. Anything more to say?

A. No.

(Chinese characters) [26]

4382/1910 4/30/23

United States of America,
Territory of Hawaii,
City and County of Honolulu—ss.

LAU KWAI, being first duly sworn, deposes and says: that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, that he has resided in the said Territory for the past 30 years.

That he is well acquainted with AH CHU and TOM SEE, the father and mother of LAU HU YUEN, that he is also well acquainted with the said LAU HU YUEN, saw him many times in Honolulu before he was taken to China by his father, that he was 2 years old when taken there in the year KS 25, and is still living in China up to the present time; that the said LAU HU YUEN was born in

the year KS 23 at Honolulu, City and County of Honolulu, Territory of Hawaii, and is now 26 years old; that said LAU HU YUEN is desirous of making a trip to this Territory to live and to make his residence here as an American citizen.

That this affidavit is made for the purpose of identifying him to land on the Territory, and that the photograph hereto attached is a good likeness of the said LAU HU YUEN at the present time.

(Chinese Characters) (Lau Kwai) (Photograph)

Subscribed and sworn to before me this 23rd day of February, 1923.

[Seal] ALETHEIA JONES

Notary Public, First Judicial Circuit, Territory of Hawaii. [27]

United States of America,
Territory of Hawaii,
City and County of Honolulu—ss.

LAU YEN, being first duly sworn, deposes and says: that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, that he has resided in the said territory for the past 35 years.

That he is well and intimately acquainted with AH CHU and TOM SEE, the father and mother of LAU HU YUEN, that he is also acquainted with the said LAU HU YUEN, saw him many times in Honolulu before he was taken to China by his father, that he was 2 years old when taken there in the year KS 25, and is still living in China up

to the present time; that said LAU HU YUEN was born in the year KS 23 at Honolulu, City and County of Honolulu, Territory aforesaid and is now 26 years old; and as to the matters and things set forth in the affidavit of LAU KWAI therein stated are true of my own knowledge.

That this affidavit is made for the purpose of identifying him that he was born in the Territory of Hawaii, and that the photograph hereto attached is a good likeness of the said LAU HU YUEN at the present time.

(Chinese characters) (Lau Yen)

Subscribed and sworn to before me this 23 day of February, 1923.

[Seal] ALETHEIA JONES

Notary Public, First Judicial Circuit, Territory of Hawaii. [28]

Dept. 35 Part of Exh. #1

U. S. Exhibit A-4

marked for identification

3-13-35

U. S. v. LAU HU YUEN

Deportation #35

GOVERNMENT'S EXHIBIT

No. A-4

U. S. Department of Labor

Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: Testimony of WONG PAN HIN as supporting witness for LAU HU YUEN before Board of Special Inquiry, Honolulu, T. H. April 28, 1923. U. S. Immigration file 4382/1910. [29]

Witness sworn, testifies: CI 31035 red.

Q. Name and age?

A. Wong Pan Hin, no other name, 22.

Q. Where were you born?

A. Barn Mee In village, China.

Q. When did you first come to Hawaii?

A. 1920.

Q. What is the purpose of your visit here today?

A. Witness for Lau Hu Yuen.

Q. Any other name?

A. Lau Chock Wah.

Q. How old?

A. 26.

Q. Where was he born?

A. Hawaii.

Q. How do you know that?

A. His father told me in the village in China.

Q. What is his name?

A. Lau Ah Chew.

Q. What is he doing in China?

A. Rice planter.

Q. Name of the applicant's mother?

A. Tom She, she died in Hawaii.

Q. Has the applicant any brothers or sisters?

A. No.

Q. When did the applicant go to China from

A. I do not know.

Q. What has the applicant been doing in China?

A. Working at Sheackee city.

Q. He married?

A. Yes, wife, Chun She.

Q. How many children has he?

A. Two sons—Lau Bung Ken, 6 or 7; Lau Bung Sun, 3 or 4.

Q. Would you know the applicant if you should see him now?

A. Yes.

IDENTICATION IS MUTUAL.

Q. Anything more to say?

A. No.

Wong Pan Hin [30]

4382/1910 4/30/23

Dept. 35 Part of Exh. #1

U. S. Exhibit

A-5

Marked for identification

3-13-35

U. S. v. LAU HU YUEN

Deportation #35

GOVERNMENT'S EXHIBIT

No. A-5

U. S. Department of Labor

Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: Decision of Board of Special Inquiry, at port of Honolulu, T. H., on April 28, 1923, admitting as Hawaiian-born citizen LAU HU YUEN. Immigration File 4382/1910. [31]

Note: The Doric departed November 24, 1899 but there are no names on the list.

The Board of Health records show that TOM SHE, 38, died June 19, 1899 at Beretania and Smith streets—remains removed March 30, 1917

MOTION.

HARRY B. BROWN: From the death record, identifications and testimony I am of the opinion that the applicant was born in Hawaii and move that he be admitted as HAWAIIAN BORN.

MARTHA MAIER: I second the motion.

LOUIS CAESAR: I concur.

Certified to be correct

MARTHA MAIER
Stenographer.

4/30/23 4382/1910

9-23-25
see death record
in 4382/1646; 4382/1282
& 4382/1619.

/s/ G.A.E. [32]

U. S. EXHIBIT No. 2

Dept. #35
U. S. Exhibit "B"
marked for identification
3-13-35

Exhibits B & D admitted
As U. S. Exhibit #2
3-19-35

U. S. v. LAU HU YUEN
Deportation #35
GOVERNMENT'S EXHIBIT
No. B

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: Application by LAU HU YUEN for Chinese Certificate of Identity on May 3, 1923, and his receipt for same issued June 18, 1923. Immigration File 4382/1910. [33]

U. S. DEPARTMENT OF LABOR
Immigration Service
O.K. J.L.M.

Office of Inspector in Charge
Honolulu, Hawaii

Inspector in Charge,
U. S. Immigration Service (Date) May 3, 1923
Honolulu, T. H.

Sir:

I hereby make application for a CERTIFICATE OF IDENTITY as provided by Rule 19 of the Chinese Regulations.

NAME: Lau Hu Yuen alias Lau Chock Wah.

AGE: 25 yrs.

Sex: Male.

PRESENT ADDRESS: 186 Kukui St., Hon. T. H.

HEIGHT WITHOUT SHOES: 5 feet, 5¾ inches.

OCCUPATION: Student.

ADMITTED AS: Hawaiian Born.

PER S. S. Pres. Pierce.

DATE: April 27, 1923.

DATE ADMITTED: April 30, 1923.

FILE No.: 4382/1910.

PHYSICAL MARKS: None.

SIGNATURE OF APPLICANT (Chinese characters).

DATE OF ISSUANCE: ....
RECEIVED C. OF I. No. 46459.
THIS 18TH DAY OF June, 1923
SIGNATURE (Chinese characters)
(Photograph) [34]

Dept. 35
U. S. Exhibit
D
Marked for identification
3-13-35
Admitted as U. S. Exhibit #2
with U. S. Exh. B for Ident.

U. S. v. LAU HU YUEN
Deportation #35
GOVERNMENT'S EXHIBIT *F*

U. S. Department of Labor
Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: Chinese Certificate of Identify No. 46459 issued to LAU HU YUEN on June 18, 1923, at the port of Honolulu, T. H. by U. S. Immigration Service. [35]

(Photograph)
Lau Hu Yuen alias
Lau Chock Wah

Description

Name: LAU HU YUEN alias LAU CHOCK WAH.

Age: 25 .... Height: 5 ft. 5 3/4 in.

Occupation: student—186 Kuhui St., Honolulu, T. H.

Admitted as Hawaiian Born ex s/s PRES. PIERCE April 30, 1923; file No. 4382/1910.

Physical marks and peculiarities: None.

Issued at the port of Honolulu, T. H., this 29th day of May, 1923.

[Seal] (s) RICHARD L. HALSEY
Immigration Official in Charge

(Reverse Side)

No. 46459 Original

THE UNITED STATES OF AMERICA
Department of Labor

Certificate of Identify Under Rules Relating to Chinese Residents

This is to certify that the Chinese person named and described on the reverse side hereof has been regularly admitted to the United States, as of the status indicated, whereof satisfactory proof has been submitted. This certificate is not transferable, and is granted solely for the identification and protection of said Chinese person so long as his status remains unchanged, to insure the attainment of

which object an accurate description of said person is written on the reverse side hereof, and his photographic likeness is attached, with his name written partly across, and the official seal of the United States Immigration officer signing this certificate, impressed partly over said photograph.
Appl. 4382/1910.
F. Arnold Insp. 11-1-34. [36]

U. S. EXHIBIT No. 3.

Dept. #35
U. S. Exhibit
"C"
marked for identification
3-13-35

Admitted as U. S. Exhibit #3
3-19-35

U. S. v. LAU HU YUEN
Deportation #35
GOVERNMENT'S EXHIBIT
No. C

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: Application of LAU HU YUEN to U. S. IMMIGRATION SERVICE, Honolulu, T. H., on October 20, 1934, for certificate of citizenship—Hawaiian Islands. U. S. Immigration File 4382/1910. [37]

Form 108

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service
4382/1910

APPLICATION FOR "CERTIFICATE OF CITIZENSHIP—HAWAIIAN ISLANDS"

October 20, 1934

To the District Director of Immigration and Naturalization, Honolulu, T. H.

It being my intention to leave the Hawaiian Islands on a temporary visit, I hereby apply under the provisions of Rule 10, of the Immigration Laws and Rules of March 1, 1927, for a "Certificate of Citizenship—Hawaiian Islands," submitting herewith such documentary proof of citizenship as I possess, and agreeing to appear at such time and place as you may designate and, if required, to produce then and there witnesses for examination regarding the claim made by me.

(s) LAU HU YUEN
(Signature of applicant)
2136 Coyne St.
(Address)
Honolulu, T. H. [38]

U. S. EXHIBIT #4

Admitted in Evidence
3-25-35

U. S. v. LAU HU YUEN
Deportation #35
GOVERNMENT'S EXHIBIT
No. G

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

IMMIGRATION AND NATURALIZATION FILE

Subject: Original Disinterment Permit No. 572, issued on March 30, 1917, to GEO. H. LEONG, by the Board of Health, Honolulu, T. H., for remains of TOM SHEE, from MANOA CEMETERY, Honolulu, T. H. [39]

PERMIT FOR DISINTERMENT.

Disinterment Permit
Number
No. 572

BOARD OF HEALTH
Honolulu, March 30, 1917

To the Superintendent of Manoa (Chinese) Cemetery:

Permission is hereby given for the Disinterment (the grave to be properly refilled) of the remains of TOM SHEE,

Age 38 Years, Sex Female, Nationality Chinese Died June 19, 1899. Cause of Death Consumption.

[Seal] (s) M. H. LEMON,
Registrar General, Territorial
Board of Health. [40]

U. S. EXHIBIT #5

(S) W. F. T.

Dept. #35, Lau Hu Yuen, etc.
Admitted in evidence
3-28-35

Heung Shan district, Dai Jee Doo, Lung Yit tow village This is to certify that Tom Shee (wife of Din Moon) who died on June 19, She was a member of the Association and should be permitted to be buried at Association plot No. 58

Free of charge

99 Year June 19th

Lin Yee Tong
By Wai Nam

(The words underscored are printed form, the balance written in). [41]

[Title of Court and Cause.]

DECISION.

This matter came on for hearing on March 13, 1935, the Government being represented by Willson C. Moore and Jean Vaughn, Assistant United States

Attorneys, and the defendant being represented by Charles H. Hogg, Esq.

The defendant is charged with being a person of Chinese descent, of having "by false and fraudulent representations and claim of United States citizenship" on or about April 30, 1923, unlawfully obtained admission into the United States at Honolulu and of being a person "not lawfully entitled to be or remain in the United States."

The official record of proceedings of the Board of Special Inquiry, convened in 1923, which Board admitted defendant, was admitted in evidence over the objection of the defendant—(U. S. Ex. 1). The application of defendant for Chinese certificate of identity and the resulting certificate were admitted as "United States Exhibit 2." The certificate was issued May 29, 1923. [44]

Upon the admission in evidence, by the Government, of the Certificate of Identity and the earlier proceedings upon which it was based, there was established the prima facie right of the defendant to be and remain in the United States—Fong Lum Kwai v. U. S., 49 F. 2, 19; Lee Choy v. U. S., 49 F. 2, 24; Choy Yuen Chan v. U. S., 30 F. 2, 516; Leong Kwai Yin v. U. S., 31 F. 2, 738.

A person of Chinese descent who has been admitted to the United States by a Board of Special Inquiry, and has a Chinese Certificate of Identity, legally is entitled to remain unless such certificate is impeached either for fraud or error,—Leong Kwai Yin v. U. S., 31 F. 2, 738, or act justifying deporta-

tion or that he obtained his admission fraudulently—Choy Yuen Chau v. U. S., 30 F. 2, 516, or until proved to be improvidently issued or fraudulently obtained,—Lee Choy v. U. S., 49 F. 2, 24 (U. S. C. C. A.-9).

At this particular stage of the hearing, the case comes strictly within the decision in Fong Lum Kwai v. U. S., 49 F. 2, 19 (U. S. C. C. A.-9), wherein the Court stated:

> (P. 23) "Upon the authority of the Japanese Immigrant Case, supra, and Martin v. Mott, 12 Wheat. 19, 31, 6 L. Ed. 537, it was held that the decision of the Board of Special Inquiry was prima facie correct, and was sufficient to establish his right to remain in the United States, * * * in the absence of a charge that he has committed some act which justifies his deportation, or some affirmative proof upon the part of the government that he obtained admission fraudulently."

As to the above statement of the law at this particular stage of the proceedings I believe both counsel agree. However, the government contended that it was prepared to show by affirmative proof, the fraudulent entry and to [45] proceed upon their theory of the case, viz: that the defendant obtained his admission by claiming to be the son of one Tom Shee who died in Honolulu, on Beretania Street near Nuuanu Street, June 19, 1899, and was buried in the Manoa Chinese Cemetery in Honolulu and her remains disinterred in 1917 and taken to China; that the defendant claimed Tom Shee had no chil-

dren except him and that her husband, that is, defendant's father, "was LAU AH CHEW alias LAU CHUNG NG, 65." That IN FACT Tom Shee DID die on June 19, 1899, at Beretania near Nuuanu, and was buried in the Manoa Chinese Cemetery, and her remains were disinterred in 1917 but her remains were NOT taken to China in 1917, she was NOT the mother of the defendant and it was NOT true that she had only one child, the defendant, and that the purported father of defendant (Lau Ah Chew) was not her husband; that, in fact, her remains were not taken to China until 1920, her husband was Leong Din Moon, she had four children, one son who died in 1900, one daughter now in China, one son whose residence had always been the Hawaiian Islands who would be produced as well as one daughter living here who would be produced and that defendant was no relation to the real children of the said Tom Shee, nor was he the son of Tom Shee.

In the proceedings of the Board of Special Inquiry April 28, 1923, the defendant claimed: That he was born 7th month 14th day K. S. 23, (August 11, 1897), at "Beretania Street near Nuuanu", Honolulu; that his father was "LAU AH CHEW alias LAU CHUN NG, 65"; that his mother was TOM SHEE, "died in Hawaii, K. S. 25, 5th month 12th day" (June 19, 1899) and her remains were "taken to China in C. R. 6," (1917); [46] that he went to China "when I was two years old—DORIC—K. S. 25—10th month 22nd day" (Nov. 24, 1899) with father; that he had no brothers or sisters and that his father told him.

LAU YEN alias LAU KWOCK LEONG, aged 58, witness at that time for defendant stated: That defendant was born at "Beretania Street near Nuuanu"; that he saw him two or three months after he was born; that defendant's mother was "TOM SHEE, died at Beretania Street near Nuuanu, K. S. 25, the 5th month", (June, 1917); that defendant went to China with his father, K. S. 25, 10th month (November 1899) on S. S. DORIC: that defendant has no brothers or sisters and that his native village is LUNG TOW WAN.

At the same hearing, LAU KWAI alias LAU KWAI LEONG, age 47, testified: That defendant was born in "Hawaii, Beretania near Nuuanu"; that he saw him a week after he was born; that defendant's "mother died in Hawaii—K. S. 25, about the 5th month (June, 1899)—TOM SHEE"; that defendant went to China "K. S. 25, 10th month 22nd day on the S. S. DORIC"—with the witness and that defendant has no brothers or sisters.

Witness, 1923, WONG PAN HIN age 22, testified: That defendant was 26 years old, born in Hawaii and "his father told me"; that defendant's mother was "TOM SHEE, she died in Hawaii" and that defendant had no brothers or sisters.

At said hearing appears the following note:

NOTE: The DORIC departed November 24, 1899 but there are no names on the list.

The Board of Health records show that TOM SHE, 38, died June 19, 1899 at Beretania and Smith Streets—remains removed March 30, 1917. [47]

GEORGE HOON LEONG testified: that he was a statistician with Lewers & Cooke, (Honolulu) and had been employed by them for 23 years; that he was born in Honolulu, September 11, 1890; that his father was LEONG MING, married name LEONG DING MOON; that he (witness) was born in what is now called the Beretania Children's Playground, on Smith Street between Beretania and Pauahi Street with a little running back to Nuuanu; that his mother was TOM SHEE or LEONG TOM SHEE, the "Leong" coming from her marriage to Leong Ming alias Leong Din Moon, father of witness; that his mother died "six or seven months before the plague fire which was in 1900, and according to the Board of Health records it was June 19, 1899"; that he recalls slightly matters surrounding her sickness and burial, especially the latter as he was about 8½ years old; that she was buried at the Manoa Chinese Cemetery and attended the funeral, remembers some of the relatives who attended and the Chinese Undertaker, Wong Mun, who is dead; that they went to the Cemetery in a hack; that in 1917 he went to the Board of Health, got a permit and disinterred his mother's remains and then left them at the house of the Manoa Cemetery until October 10, 1920, when he went with the remains on the S. S. "NANKING" to China; that this was his first trip to China since his birth in 1890; that he has two sisters living and a brother who died in 1900; that the elder sister is Leong Sing Hee, living in Canton, China, a sister Leong

Kam Ho, now Mrs. K. T. Ho, residing in Honolulu; that there were no other children; that the defendant is no relation; that his father died in China about 9 years ago; that they lived with the father in Honolulu until 1922 when the father went to China. [48]

JESSE LEONG HO, Chinese name Leong Kam Ho, family name Leong, testified: that she is 39 years old, in business in Honolulu and is the wife of K. T. Ho, Vice-President of the Liberty Bank; that her mother was TAM SHEE or Tom Shee as "Tam" and "Tom" have the same Chinese characters as have also "See" and "Shee"; that her father told her that her mother died before the fire of 1900; that her father was Leong Ming, married name Leong Din Moon, now dead; that she has one older brother and one older sister now living (identifies George H. Leong, former witness as her brother) and one younger brother who died as an infant when she was very young, whom she recalls very faintly; that her sister Leong Sang Hee, lives in China, that her mother died a few months before the fire of 1900 and was buried in the Manoa Chinese Cemetery and she recalls going to the funeral; that she (witness) lived here until 1916, then went to Los Angeles for a year and was married and returned; that later she went in 1920, to live in Shanghai; that her mother's remains were removed from the Territory; that she remembers as her brother came through there on his way to Canton in 1920 or 1921 but she was out of the city; that

the Chinese village of her parents was LUNG YIT TAU; that there were never any other children of Tom Shee except as given and only one living brother and that defendant (indicating him) is no relation to her.

MARY HESTER LEMON, Registrar General of births, marriages and deaths, Board of Health testified: In the "Records of Deaths, Honolulu", in book marked "January 1898 to April 1900" appears in the proper columns—[49]

DATE: June 19, 1899.

NAME: TAM SEE.

SEX: F (female).

AGE: 38.

NATIONALITY: Chinese.

WARD: 4.

CAUSE OF DEATH: Consumption.

ATTENDED BY: Dr. Ung Fong.

CEMETERY: Manoa.

REMARKS: Bert. near Nuuanu (place of death).

that in columns headed "Cemetery" and "Remarks" and over the words "Manoa" and "Beretania near Nuuanu" appears in red ink "Permit to disinter issued March 30, 1917, for removal to China; that there appeared from the record that a TAM SEE, female, age 31, Chinese, ward 4, died of fever and was buried at Pauoa and had died at Kapukolu; and that a permit to disinter and remove to China had been issued August 27, 1904; that witness had carefully searched the records and had been unable to

find any record of death of a Tam See or similar name anywhere within a reasonable time of the dates mentioned.

The witness produced the stub of a disinterment permit #572 as follows:

> Reading from top to bottom: "2.50" in figures; "Geo. H. Leong"; printed "Disinterment permit No. 572"; date of issue "Mar. 30, 1917"; name "Tam See"; sex "F"; age "38"; Nationality "Chinese"; date of death "June 19, '99"; cause of death "T. B."; cemetery "Manoa". Then, stamped and written across the face of the stub appears "Received fee 2.50"; initialed "K. B. P." Date: "March 31, 1917".

The disinterment permit of which the stub above cited was the retained official record and which was identified by the Registrar General and had been turned over to the Government by Geo. H. Leong, was admitted in evidence United States "Exhibit 4", and is substantially as follows: [50]

BOARD OF HEALTH

Disinterment Permit No. 572

Honolulu March 30, 1917.

To the Superintendent of Manoa (Chinese) Cemetery:

Permission is hereby given for the Disinterment (the grave to be properly refilled) of the remains of TAM SEE, Age 38 years; Sex—

Female; Nationality—Chinese; Died June 19, 1899; Cause of Death—Consumption.

(Signed) M. H. Lemon
Registrar General,
Territorial Board of Health.

(The words underscored are printed form, the balance written in).

The first book of record of burial permits of the Manoa Chinese Cemetery (LIN YEE TONG) P. 8, beginning with 1893 and containing the original retained record of Tom Shee, buried in 1899, was admitted in evidence over the objection of the defendant, as an ancient document, (United States Exhibit 5) and it was stipulated that the following is a correct translation:

"Heung Shan district, Dai Jee Doo, Lung Yit tow village. This is to certify that Leong Tom Shee (wife of Din Moon) who died on June 19. She was a member of the Association and should be permitted to be buried at Association plot No. 58

Free of charge

99 Year June 19 th

Lin Yee Tong
By Wai Nam"

(The words underscored are printed form, the balance written in).

The defendant at the close of Government case moved for a dismissal which was denied.

Defendant introduced file from the Archives of Hawaii, showing that S. S. "DORIC" departed for "Yokohama—Hong Kong", November 24, 1899, showing on P. 2, line 12, "AH CHU" and on line 13 "Child"—this was read into the record. [51]

The defendant testified; that what he knew of family history was told him by his father; that he was born at Beretania Street near Nuuanu, 14th day 7th moon, K. S. 23, (Aug. 11, 1897); that his father was Lau Ah Chu alias Chun Ing; that his mother was Tom Shee who died 12th day 5th moon, K. S. 25, (June 19, 1899) at "Beretania near Nuuanu" and buried in Manoa Cemetery; that after his mother's death, his father took him to China—Doric—22 day 10 moon, K. S. 25 (Nov. 24, 1899), and took him to village of Lung Tow Wan to live and that his father died in 1924 at the age of 66; that in C. R. 6 (1917) while he was working in a nearby city his mother's remains were brought to China and buried in rear of his native village; that his father told him that his mother's remains were so buried; that his father did not tell him where his (witness) mother was born, nor anything about her birth nor parents nor when she came to Hawaii; nor how long she lived here, nor the boat she came on nor about her ancestors but told him only that they lived at "Beretania near Nuuanu"; that his father told him his mother died of T. B., age 38 years; that his mother's remains were brought to China March 30, 1917, and denied that he had

34 (M)

stated on November 27, 1917, that his mother's

remains stayed in Manoa Cemetery until March 30, 1917, and also denied that he had stated at that time that his father had died June 1, 1934, at the age of 76 years.

TOM HOON, the official who acted as interpreter on November 1st and Nov. 27, 1934, when the defendant was applying for a "Certificate of Citizenship—Hawaiian Islands" testified in effect that defendant had said: That his (defendant's) mother was Tom Shee and died in Honolulu, on [52] Beretania near Nuuanu Street, on June 19, 1899, age 30; that his father's name was Lau Ah Chew who died in China in 1934; that his mother was buried in the Manoa Cemetery, and remains removed to China in C. R. 6 (1917), and that defendant was born August 11, 1897; that on November 27, 1934, defendant had stated his mother Tom Shee died in Honolulu on Beretania near Nuuanu Street on June 19, 1899, age 30, and remains were shipped to China on March 30, 1917, (Ch. date) by Lung Doo Chung Tong and buried in Lung Tau Wan village, that disinterment permit was obtained by the above Tong, that mother died of tuberculosis.

It developed in the case that two of the witnesses on behalf of defendant, at the hearing in 1923, are alive and living in Honolulu. Neither was called in this case.

This leads to the inference that if called their testimony would have been against the defendant. In Hung You Hong v. U. S., 68 F. (2d) 67, 69, (C. C. A. 9), the court stated:

"* * * where weaker and less satisfactory

evidence is produced by a party to whom better and more satisfactory evidence is available, if his testimony is true it must be presumed that such testimony will be against him. As was said by the Supreme Court in Runkle v. Burham, 153 U. S. 216, 225, 14 S. Ct. 837, 841, 38 L. Ed. 694:

> 'The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of Clifton v. United States, 4 How. 242 (11 L. Ed. 957).'

"In a deportation case, United States ex rel. Vajtauer v. Commissioner, 273 U. S. 103, 111, 47 S. Ct. 302, 305, 71 L. Ed. 560, the Supreme Court quoted with approval from Bilokumsky v. Tod, 263 U. S. 149, 153, 154, 44 S. Ct. 54, 68 L. Ed. 221, as follows:

> 'Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character.' [53]

"That the purpose of the legislation requiring the defendants in Chinese deportation cases to take the burden of establishing their right to remain in the United States is to require them to produce the evidence which is peculiarly within their own knowledge or within the knowledge of their friends and acquaintances. In such cases it is virtually impossible for the govern-

ment to prove that a person was not born within the United States. While it is true that the direct evidence of a competent and credible witness to the fact in controversy would establish the fact in the absence of conflicting considerations, such evidence must always be weighed in the light of the ability of the applicant to produce additional or more satisfactory evidence."

I have set out the substance of considerable of the testimony on account of the many peculiar aspects of the case.

The testimony at the hearing in 1923, at the hearing in November 1934, on defendant's application for a "Certificate of Citizenship—Hawaiian", the testimony of defendant and of George H. Leong and Mrs. K. T. Ho, and the Registrar General, plus the Exhibits are to the effect:

That Tam See or Tom Shee died at Beretania Street near Nuuanu in Honolulu, June 19, 1899, of tuberculosis, was buried in the Manoa Chinese Cemetery; that her remains were disinterred in 1917 and later taken to China. The following differences between the claims of proof on the part of the Plaintiff and the Defendant appear:

Age of Tom Shee at death:

Plaintiff: 38.

Defendant: 30, 38.

Date of disinterment:

Plaintiff: March 30, 1917.

Defendant: 1917 later March 30, 1917, last statement brought into China March 30, 1917.

Person to whom disinterment permit issued:
Plaintiff: George H. Leong.
Defendant: Lung Doo Ching Siu Tong.

Name of husband of Tom Shee:
Plaintiff: Leong Ming alias Leong Din Moon.
Defendant: Lau Ah Chew alias Lau Chun Ng. [54]

Residence of husband of Tom Shee when remains shipped to China:
Plaintiff: Honolulu.
Defendant: China.

Native village of parents (Tom Shee & Husband):
Plaintiff: LUNG YIT TOW (Testimony of Mrs. Ho, and record of Cemetery (Ex. 5).
Defendant: Lung Tow Wan.

Date husband of Tom Shee went to China:
Plaintiff: 1922.
Defendant: 1899.

Number of children of Tom Shee at her death:
Plaintiff: 4.
Defendant: 1.

Relation of Defendant to Tom Shee:
Plaintiff: None.
Defendant: Son.

The primary question to be determined is whether or not the Tom Shee who, as claimed by the defendant, died at Beretania near Nuuanu, June 9, 1899,

and was buried in the Manoa Chinese Cemetery and whose remains were disinterred in 1917 and later taken to China WAS THE MOTHER OF THE DEFENDANT.

I believe the testimony of George Hoon Leong and his alleged sister Jessie Leong Ho, Chinese name Leong Kam Ho, (Mrs. K. T. Ho), as corroborated by the records of the Board of Health and the records of the Manoa Chinese Cemetery.

I find as matters of fact: that Tom Shee alias Tam See alias Leong Tom Shee died on Beretania Street near Nuuanu Street, in Honolulu, June 19, 1899, of tuberculosis, was buried in the Manoa Chinese Cemetery; that the burial permit was issued the same date by Lin Yee Tong, for burial in plot 58, Manoa Chinese Cemetery; that said permit recited that she was the Lung Yit Tow village, gave her name as Leong Tom Shee, wife of Din Moon and that she had died June 19; that her husband and Leong Ming alias Leong Din Moon; that a disinterment permit was applied for at the [55] Board of Health, by George H. Leong, who was the son of Tom Shee, and was issued to him on March 30, 1917; that the remains of said Tom Shee were disinterred on said date and kept in the house at the Manoa Chinese Cemetery until they were taken to China by her son George Hoon Leong, in 1920; that her husband, Leong Din Moon did not go to China until 1922, where he died about 1926; that the said Tom Shee had four children only, viz: George Hoon Leong and Leong Kam Ho (Mrs. K. T. Ho),

witnesses in this case, a daughter Leong Sang Hee, now in China and a son, Leong Tai Hin, who died as a very young child in 1900 and finally, that the defendant is NOT the son of the said Tom Shee.

I further find that the Tom Shee the defendant claimed as his mother at the time he was admitted in 1923 and whose death, burial, disinterment and removal to China, he described as that time and again on the witness stand in this case was IN FACT not his mother. It is admitted that the de-*scendant* is of Chinese descent.

The final question to be decided is: Is the above finding of fact sufficient to warrant the conclusion that the defendant is unlawfully in the United States, that he unlawfully obtained his admission in 1923 by false and fraudulent representations and claim of United States citizenship and that he should be deported to China.

Assuming that the court find the defendant not to be the son of Tom Shee, as claimed, it is still contended by Counsel for the defendant:

(a) That there is no affirmative showing by the government that the defendant has claimed other than what he believes to be true; [56]

(b) That there has been no affirmative proof of fraud, and

(c) That there has been no affirmative proof that the defendant is an alien.

While the certificate of identity is prima facie evidence of the right of the lawful holder to be and

remain in the United States it is not more, and may be overcome by affirmative evidence of its illegality.

In Lum Mau Shing v. U. S., 29 F. 2, 500, 501, (C. C. A. 9), the Court stated:

> "We are not to be understood as holding that either the determination by the administrative officers of appellant's status or the certificate thereof, constitutes res adjudicata, or for any other reason is final and conclusive; but we are of the opinion that, for the considerations shown, the certificate is sufficient to make a prima facie case of appellant's right of residence. Undoubtedly its efficacy may be wholly destroyed by showing that it was fraudulently obtained, and it may be that a record containing any substantial evidence tending to impeach its correctness, or to show that the holder's status is other than what is certified, would be sufficient to warrant deportation if, as a result of such evidence, the court is not convinced of the defendant's right to remain."

See also Dong Ling v. U. S., 30 F. 2, 65, 66, where the person claimed as father was later shown not to have been the father; wherein the court stated:

> "The decision of the Board of Special Inquiry was no more than prima facie evidence of the appellant's American citizenship. Its effect here is wholly overcome by the decided preponderance of the testimony."

In Lee Choy v. U. S., 49 F. 2d, 24, 26, (C. C. A. 9), the Court stated:

> "The certificate of identity was prima facie evidence of the right of the appellant to be and remain in the United States until overcome by proof tending to establish that the same was issued improvidently or was fraudulently obtained. Leong Kwai Yin v. United States, 31 F. (2d) 738 (C. C. A. 9)." [57]

The express statutory enactment *is* claimed to authorize this proceeding is Section 13, of the Act of September 13, 1888, 25 Stat. 476, 477, title 8, United States Code, section 282:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

The Act of May 8, 1892, 27 Stat. 25, (8 U. S. C. Sec. 284) states:

> "Any Chinese person or person of Chinese descent arrested under the provisions of this chapter shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the sat-

> isfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

This is a statutory rule of evidence. In Luria v. U. S., 231 U. S. 9, the Court held:

> "The establishment of a presumption from certain facts prescribes a rule of evidence and not one of substantive right: and if the inference is reasonable and opportunity is given to controvert the presumption, it is not a denial of due process of law, Mobile &c. R. R. Co. v. Turnipseed, 219 U. S. 35."

The decisions of the courts to the effect that this presumption is rebutted by the Certificate of Identity, is likewise a rule of evidence and not one of substantive right therefore the effect of the admission in evidence of the Certificate of Identity may be impeached or rebutted or nullified as noted above, by affirmative evidence tending to show fraud, false representation, illegality, error or that the certificate was improvidently issued. When the efficacy of the Certificate of Identity, is so overcome, the certificate is rendered of no probative value [58] and the burden remains where it was prior to the introduction of the certificate and the statute demands that the defendant "shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

There is ample evidence in this case to rebut the Certificate of Identity, and to show that the defendant obtained his admission by false and fraudulent representation as to citizenship, and that the Certificate of Identity was issued through error, illegality and fraud and the defendant has failed to establish his right to remain and must be deported.

Whether or not the defendant deliberately made statements which he knew were false at the time of his admission I am not prepared to state but I do find that he did make statements which he did not know to be true and the claim to admission as the true son of the said Tom Shee was false and fraudulent. At the trial, his testimony relative to the burial of his alleged mother Tom Shee, in China, in 1917, I believe to be absolutely false and known by him to be false.

A Chinese or a person of Chinese descent, arriving at this port and applying for admission especially without documentary evidence of citizenship or of evidence entitling him to admission, is not of RIGHT entitled to admission as a citizen, even though he be, IN FACT, a citizen, and if he obtains such admission by false representations as to parentage, he is not legally in the United States and may be deported. Even where an alien is admitted to citizenship by a court having full jurisdiction,— [59]

> "An alien has no moral nor constitutional right to retain the privileges of citizenship if,

> by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued. As was well said by Chief Justice Parker in Foster v. Essex Bank, 16 Massachusetts, 245, 273, 'there is no such thing as a vested right to do wrong.' Johannessen v. U. S.,—225 U. S. 227—P. 241."

The above is equally true where an attempt is made to be admitted to the United States as a citizen.

The contention that the government must establish actual intentional fraud on the part of the defendant and that this, as in cases involving fraudulent conveyances, must be established by evidence which is "clear, cogent and conclusive", I believe not well founded, but is based upon the many decisions declaring the probative effect of a Certificate of Identity, and holding it good unless affirmative evidence of fraud or one or more other valid reasons, usually any one case rarely specifying more than fraud and one other reason.

Whenever the government is induced to issue a certificate by misrepresentations, intentional or otherwise, by the party directly involved or by another or by deceit, mistake, error or illegality of any kind, a fraud on the government is consummated and the certificate fraudulently and illegally procured and improvidently issued and may be cancelled. The use of the word "fraud" in the numerous cases cited by counsel, were never in-

tended and cannot be intended to change the well grounded rules of evidence in civil cases. The Certificate of Identity, is prima facie evidence of the right of the defendant to be and remain in the United States, but it is nothing more, and when such prima facie evidence is overcome by affirmative, [60] legal, competent and admissible evidence which leads the court to believe that the holder was not entitled to its issuance the probative effect of the certificate is lost and the defendant, being of Chinese descent, must establish his right to remain.

Just because the Certificate of Identity has been introduced in evidence places no burden upon the government to prove, by affirmative proof that the defendant is an alien, the statute does not require this. A Chinese or person or Chinese descent, alien or citizen, knocking at the portals of the United States for admission must prove his right to enter. If he satisfies the Immigration authorities, he obtains admission, and receives a certificate. If he is in fact ineligible to admission or has obtained his admission illegally, by false representations as to material facts, on his part or by others, he is not entitled to the certificate, and when these facts are shown to the court by legal evidence, which the court believes, the result is as though the defendant had no certificate, and he must establish his right to remain, by affirmative proof, to the satisfaction of the court. It must be borne in mind that the statutory charge brought against the defendant is brought under 8 U. S. C. Sec. 282, when the ground

for deportation is not that the person of Chinese descent be adjudged an "alien" but the sole adjudication is whether or not such person is "found unlawfully in the United States or its Territories."

The Court is bound to adjudge that he is so found unless, after a proper application of all the testimony to the statutory as well as the established rules of [61] evidence, the defendant has shown, also by established rules of evidence, "his lawful right to remain in the United States." (8 U. S. C. Sec. 284).

I therefore find that the defendant LAU HU YUEN alias LAU CHOCK WAH, is a person of Chinese descent within the United States and that on or about April 30, 1923, he unlawfully obtained admission at Honolulu, T. H., by false and fraudulent representations and claim of United States citizenship and that he was found unlawfully in the Territory of Hawaii and is unlawfully within the United States and is a person not lawfully entitled to be or remain in the United States.

IT IS HEREBY ORDERED, ADJUDGED and DECREED, that the defendant, LAU HU YUEN alias LAU CHOCK WAH, be turned over to the Director of Immigration, Port of Honolulu, T. H., Department of Labor and that he be thereupon deported and removed from the United States to the Republic of China, as a person of Chinese descent, unlawfully in and not lawfully entitled to be or remain in the United States.

A judgment will be signed accordingly.

Dated: Honolulu, T. H., April 8, 1935.

[s] E. K. MASSEE, Judge
United States District Court
Territory of Hawaii.

[Endorsed]: Apr. 8, 1935. [62]

In the United States District Court for the Territory of Hawaii
April Term 1935.

Deportation No. 35

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LAU HU YUEN alias LAU CHOCK WAH,
Defendant.

JUDGMENT

Filed: Apr. 9, 1935 at 11 o'clock and 30 minutes a. m.

(s) WM. F. THOMPSON, JR., Clerk. [63]

In the United States District Court for the Territory of Hawaii
April Term 1935.

Deportation No. 35

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LAU HU YUEN alias LAU CHOCK WAH,
Defendant.

JUDGMENT

WHEREAS, on December 10, 1934, there was filed the sworn complaint of FRED E. ARNOLD, Immigration Inspector of the United States of America, charging that the defendant LAU HU YUEN alias LAU CHOCK WAH is a person of Chinese descent and not a citizen of the United States of America, and is now within the Territory of Hawaii, United States of America, and that the said LAU HU YUEN alias LAU CHOCK WAH has no lawful right to remain in the United States of America; and

WHEREAS, on December 10, 1934, the Defendant pleaded that he was not guilty of and generally denied the charges in the said Complaint, and on March 13, 1935, trial was commenced upon the issues thus presented, which trial was concluded on March 29, 1935, and the matter was taken under advisement by the Court, and on April 8, 1935, a written decision was filed;

NOW THEREFORE, IT IS ADJUDGED that the Defendant is a person of Chinese descent and not a citizen of the United States of America and is now within the Territory of Hawaii, United States of America, and that the said LAU HU YUEN alias LAU CHOCK WAH has [64] no lawful right to remain in the United States of America; that the Defendant be deported to China from the United States of America from the Port of Honolulu in the Territory of Hawaii; and the Defendant is hereby committed to the custody of the United States Marshal for the District of Hawaii to carry into effect this judgment of deportation.

Dated: Honolulu, T. H., this 9th day of April, 1935.

EDWARD K. MASSEE
Judge, United States District Court,
Territory of Hawaii.

[Endorsed]: Filed Apr. 9, 1935. [65]

[Title of Court and Cause.]

PETITION FOR APPEAL

To the Honorable, the Presiding Judge of the Above Entitled Court:

Comes now LAU HU YUEN, alias LAU CHOCK WAH, above named, and conceiving himself ag-

grieved by the Judgment, Order and Sentence made and entered herein in the above entitled proceedings, does hereby appeal from said Judgment, Order and Sentence to the Circuit Court of Appeals for the Ninth Circuit, and files herewith his Assignment of Errors intended to be urged upon appeal and prays that his appeal may be allowed and that a transcript of all proceedings and papers upon which said judgment, order and sentence was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

LAU HU YUEN, alias LAU CHOCK WAH,
Defendant above named,
By E. J. BOTTS,
His Attorney.

[Endorsed]: Filed June 21, 1935. [67]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant above named and files the following assignment of errors on which he will rely in the prosecution of his appeal in the above-entitled cause from the Judgment entered herein on the 9th day of April, 1935, in the United States District Court in and for the District and Territory of Hawaii.

1. That the court erred in holding and finding that defendant was unlawfully in the United States of America, and had gained his admission by false and fraudulent representations and claim of United States citizenship.

2. That the court erred in denying defendant's motion made at the conclusion of plaintiff's case to dismiss the complaint herein and to discharge defendant, for the reason that the evidence adduced by plaintiff wholly failed to establish by requisite evidence the allegations therein contained, to-wit: that said defendant had gained his admission into the United States by false and fraudulent representations and claim of United States citizenship and that he was not lawfully entitled to be and remain in the United States. [69]

3. That the court erred in admitting in evidence in the above entitled matter plaintiff's Exhibit IV, being a disinterment permit and in considering the same as evidence material in support of the charge contained in the complaint that defendant had gained his admission into the United States by false and fraudulent representations of citizenship.

4. That the court erred in admitting in evidence a certain stub book of the Manoa Chinese Cemetery Association (U. S. Exhibit V) and in considering the same as competent evidence in support of the allegations of the complaint herein that said defendant gained his admission into the United States as a citizen by false and fraudulent representations.

5. That the court erred in holding and deciding that said defendant had not sustained the burden of affirmative showing of his right to be and remain in the United States imposed upon him by the Act of May 5, 1892, Title VIII, United States Code, 284.

6. That the court erred in refusing to give consideration to the evidence in this case, which affirmatively established the Hawaiian birth of defendant.

7. That the court erred in presuming fraud in connection with the admission of defendant into the United States as a citizen thereof on April 30, 1923, and erred in refusing to accord to the proceedings before the Board of Special Inquiry which attended the admission of said defendant into the United States, as aforesaid, the presumptions of regularity, good faith and bona fides to which said proceedings were entitled. [70]

8. That the decision of the court in the above entitled matter vacating and setting at naught the decision and findings of the Board of Special Inquiry on April 30, 1923, was erroneous for the reason that the decision and judgment of the court in said matter was made in the absence of evidence establishing fraud and perjury on the part of defendant and his witnesses in their evidence before said Board of Special Inquiry in connection with defendant's admission into the United States, as aforesaid.

9. That defendant, having been duly admitted at the port of Honolulu by a Board of Special Inquiry, which heard and considered the evidence adduced by defendant and his witnesses to establish defendant's Hawaiian birth and American citizenship, the court erred in vacating and setting at naught the decision of said Board in the absence of a showing that said defendant and his witnesses conspired together and resorted to perjury before said Board to accomplish defendant's admission.

10. That the court erred in entering judgment herein ordering and directing the deportation of defendant to the Republic of China.

WHEREFORE, the appellant prays that said judgment and order of deportation be reversed and that said District Court for the District of Hawaii be ordered to enter a judgment dismissing said complaint and discharging appellant.

(s) E. J. BOTTS

Attorney for Appellant.

Receipt of a copy of the foregoing Petition for Appeal and Assignment of Errors in the above entitled court and cause is hereby acknowledged, this 21st day of June, 1935.

(s) JEAN VAUGHN

Ass't. United States District Attorney.

[Endorsed]: Filed June 21, 1935. [71]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon the application of LAU HU YUEN, alias LAU CHOCK WAH, and upon the motion of his attorney, E. J. BOTTS, ESQUIRE,

IT IS HEREBY ORDERED that the petition for appeal, heretofore filed herein by defendant, LAU HU YUEN, alias LAU CHOCK WAH, be and the same is hereby granted and the appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and sentence herein and heretofore filed, be and the same is hereby allowed and a transcript of the record of all proceedings and papers upon which said judgment, order and sentence was made, duly certified and authenticated, be transmitted, under the seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, State of California.

Dated at Honolulu, T. H., this 21st day of June, A. D. 1935.

(s) EDWARD K. MASSEE,
Judge of the above-entitled Court.

Receipt of a copy of the foregoing ORDER ALLOWING APPEAL is hereby acknowledged, this 21st day of June, A. D. 1935.

(s) JEAN VAUGHN,
Asst. U. S. District Attorney.

[Endorsed]: Filed June 21, 1935. [73]

[Title of Court and Cause.]

CITATION ON APPEAL.

THE UNITED STATES OF AMERICA—ss.
THE PRESIDENT OF THE UNITED STATES.
To the UNITED STATES OF AMERICA, and I. M. STAINBACK, ESQUIRE, its attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty days from the date of this Writ, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States District Court for the District and Territory of Hawaii, wherein LAU HU YUEN alias LAU CHOCK WAH is appellant and you are appellee, to show cause, if any there be, why the judgment, order and sentence in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States, this 21st day of June, A. D. 1935.

EDWARD K. MASSEE,
Judge of the above-entitled Court.

Attest:
[Seal] WM. F. THOMPSON, JR.,
Clerk, U. S. District Court.

Received copy, this 21st day of June, 1935.

JEAN VAUGHAN,
Asst. U. S. District Attorney. [78]

In the District Court of the United States in and for the District and Territory of Hawaii.

Deportation No. 35.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LAU HU YUEN alias LAU CHOCK WAH,
Defendant.

STATEMENT OF EVIDENCE.

BE IT REMEMBERED that the above entitled cause came on regularly for trial before the United States District Court for the Territory of Hawaii on the 13th day of March, 1935, the Government being represented by Assistant United States Attorney Willson C. Moore and Ernest J. Hover, Naturalization Examiner, of counsel, the defendant being personally present and represented by Charles H. Hogg, Esquire, as his counsel.

UNITED STATES—APPELLEE'S CASE

TESTIMONY OF WILLIAM G. STRENCH.

The witness, William G. Strench, having been duly sworn, testified on behalf of appellee as follows:

That he is District Director of Immigration and Naturalization for the Port of Honolulu, with 27 years service in the Immigration Service and has

occupied his present position for seventeen months, and as such Director has in his possession, as official custodian, the official records of the Immigration and Naturalization Service at the Port of Honolulu. The witness identified a file of the Immigration Service as comprising the testimony of the defendant LAU HU YUEN before a Board of Special Inquiry at Honolulu, T. H., on April 28, 1923, which was marked "U. S. Exhibit A for identification".

[80]

The witness also identified in said file the record of testimony of Lau Kwock Leong, Lau Kwai, Wong Pan Hin, witnesses for the Defendant LAU HU YUEN on the occasion of his admission to the Territory of Hawaii in 1923, the same being marked "U. S. Exhibits for identification A-2, A-3 and A-4" respectively. The decision of the Board of Special Inquiry was likewise identified and marked as "U. S. Exhibit A-5 for identification," and the whole of these typed records was identified as comprising the official record of such Board of Special Inquiry proceeding relating to Defendant's admission in 1923.

The witness further identified as part of the official records of the Immigration Service an application made by the Defendant for a Certificate of Identity, on May 3, 1923, at Honolulu, bearing file No. 4382/1910, which was marked "U. S. Exhibit B for identification". And similar identification was

(Testimony of William G. Strench.)
made of an application by the Defendant for a Certificate of Citizenship of the Hawaiian Islands on October 20, 1934, which was marked "U. S. Exhibit C for Identification".

The witness further testified that the official immigration records at the Port of Honolulu are kept in a vault in the Immigration Station to which he has access, and that he had entrusted Mr. Hover, Naturalization Examiner at this Port, officially with the original immigration file in the Lau Hu Yuen matter.

TESTIMONY OF ERNEST J. HOVER.

The witness, Ernest J. Hover, being duly sworn, testified on behalf of appellee as follows: [81]

That he is an immigration inspector and Naturalization Examiner for the Department of Labor stationed at Honolulu and has been in the Immigration Service since 1927. Shown exhibits "U. S. Exhibits for Identification marked A-1 to A-5 inclusive" testified that he had seen these documents before; that he first saw them at the Immigration Station as part of the office files of the Immigration files in the case of LAU HU YUEN, file No. 4382/1910; that they were handed to him by the District Director at this Port; that he knew that these records covered the proceedings of the Board of Special Inquiry record of the admission of LAU HU YUEN on April

28, 1923, consisting of the testimony of LAU HU YUEN and the three supporting witnesses, and the concluding page being the decision of said Board; that the documents "U. S. Exhibits for Identification A-1 to A-5" comprise the original file of the proceedings before the Board of Special Inquiry with reference to the admission of LAU HU YUEN, April 28, 1923.

TESTIMONY OF FRED E. ARNOLD

The witness, Fred E. Arnold, having been duly sworn, testified on behalf of appellee as follows:

That he is an inspector, United States Immigration Service, employed since February 18, 1931, and stationed in Honolulu since September 28, 1934, employed in the Chinese Division; that he knows the defendant; that Lau Hu Yuen is a person of the Chinese race engaged in vegetable planting; that the witness had sworn to a complaint against appellant December 10, 1934; that the official records at the Port of Honolulu show that Lau Hu Yuen was admitted at said Port on April 28, 1923; that witness examined the records of the local Board of Health regarding the names of decedents prior to 1900. Asked if he had found any record at the Board of Health in the name of "Tom Shee", witness said: [82]

(Testimony of Fred E. Arnold.)

"I found a record of Tom Shee that died on Beretania Street near Nuuanu Street, Honolulu, on June 19, 1899."

That record showed that her age at the time of death was 38 years. He was next asked if he located in the records of the Board of Health a record of disinterment permit of said Tom Shee and answered that he did and that such permit was dated March 30, 1917. He further testified that according to the records of the Board of Health, the disinterment permit had written on it in ink the name of George H. Leong. That of the three witnesses who testified in 1923 for Lau Hu Yuen before the Board of Special Inquiry, two were in Honolulu in November, 1934, that he knew they were here at that time because he had questioned them. These witnesses were Lau Kwai and Wong Pan Hin. The witness then identified U. S. Exhibits for Identification A-1 to A-5 inclusive. That he had seen these documents before and that they comprised the complete record of the Board of Special Inquiry hearing which admitted Lau Hu Yuen to the Territory of Hawaii in 1923, file No. 4382/1910. That he knew the defendant; that he was in the courtroom. (The witness then identified the Defendant). The witness was then asked if he had made a search of the records of the Territorial Archives for departures at or about

(Testimony of Fred E. Arnold.)
the time claimed in the original record of defendant as to his departure. He answered in the affirmative saying:

"I found that the steamship 'Doric' left Honolulu at the time claimed and that there was a list of names of the persons who departed, of whom I would say about 73 were Chinese." He said the defendant claimed his father's name was Lau Ah Chew. Asked if he had found such name or similar name upon the record of the departure of the S.S. DORIC, he said he had not. The witness then identified the Certificate of Identity, which had been issued to the defendant. (U. S. Exhibit for Identification D). [83] He was then shown U. S. Exhibit B for Identification and testified it was an application for and a receipt for a Certificate of Identity in the usual form; that the defendant had signed his name upon the receipt when he received the Certificate of Identity.

Counsel for the Plaintiff offered in evidence "U. S. Exhibits for Identification A-1 to A-5" inclusive, which were admitted in evidence and marked "U. S. Exhibit No. 1." U. S. Exhibit 1 being the entire record of the Immigration Service in Honolulu upon the admission of the Defendant Lau Hu Yuen to the Territory of Hawaii, on April 30, 1923. U. S. Exhibit 1 being attached hereto, marked "U. S. Exhibit No. 1" and by reference made a part hereof.

Counsel for Plaintiff offered in evidence "U. S. Exhibits for Identification B and D" which were

(Testimony of Fred E. Arnold.)
admitted in evidence and marked "U. S. Exhibit 2". U. S. Exhibit 2 being the Application of Lau Hu Yuen for a Certificate of Identity and the Certificate of Identity issued to Lau Hu Yuen on the 29th day of May, 1923, said U. S. Exhibit No. 2 being attached hereto, marked "U. S. Exhibit No. 2" and by reference made a part hereof.

Counsel for the Plaintiff offered in evidence "U. S. Exhibit for Identification C" which was admitted in evidence and marked

"U. S. EXHIBIT No. 3."

U. S. Exhibit No. 3 being as follows:

"Form 108

"U. S. DEPARTMENT OF LABOR
"Immigration and Naturalization Service

"APPLICATION FOR 'CERTIFICATE OF CITIZENSHIP—HAWAIIAN ISLANDS'

"October 29, 1934

"To the District Director of Immigration and Naturalization, Honolulu, T. H.

"It being my intention to leave the Hawaiian Islands on a temporary visit, I hereby apply under the provisions of Rule 10, of the Immigration Laws and Rules of March 1, 1927, for a 'Certificate of Citizenship—Hawaiian Islands,' submitting herewith such documentary proof of citizenship as I possess, and agreeing to appear at such time and place as you may designate and, if required, to produce

(Testimony of Fred E. Arnold.)

then and there [84] witnesses for examination regarding the claim made by me.

"LAU HU YUEN
"(Signature of applicant)
"(Address)
"2136 Coyne St.
"Honolulu, T. H."

TESTIMONY OF GEORGE HOON LEONG.

The witness, George Hoon Leong, being first duly sworn, testified on behalf of appellee as follows:

That he is a statistician with Lewers & Cooke; that he has been employed there twenty-three years and is forty-four years of age; was born in Honolulu and has lived in the Territory of Hawaii since birth, except for two trips to China; that he made his first trip October 10, 1920, and returned in January, 1921; that he left here as a passenger on the S.S. Nanking and returned as a passenger on the S.S. Siberia Maru; that his second visit was in January, 1931, as a passenger on the S.S. Express of Canada, returning in the middle of May, 1931, on the same boat; that his father's name was Leong Ming, married name Leong Din Moon; that the witness was born September 11, 1890 "in that part of the city they call at present Beretania Children's Playground, known as Ahia Block", which is on Smith Street between Beretania and Pauahi. Asked if it bordered on any other street besides

(Testimony of George Hoon Leong.)
Smith, he said: "Back of that would be Nuuanu Street". Witness said his mother's name was Tom Shee or Leong Tom Shee, the Leong coming from her marriage to Leong Ming (his father); that his mother is dead; that she died as far as witness could remember "about six or seven months before the plague fire, which was in 1900" and that according to the Board of Health records her death was on June 19, 1899. He was asked if he recalled the incident of her death and he said she was sick [85] about six or seven months during that time; that he was eight and a half years of age and used to do a "lot of helping around the house". He said that he remembered his mother as having small feet and was a small built woman and he recalled the time of her death, which is always in his memory. He was asked if he remembered her and he said he did because he had a picture of her at home hung on the wall. He said of his own knowledge he knew that she died of a sickness; lingering sickness. He said: "Well, she was sick, and then she was well, and I still remember she ate an orange, and after eating the orange it caused her death"; that she was buried in the Manoa Chinese Cemetery and he attended her funeral, which he remembered and said it was attended by a few relatives and that he remembered the undertaker, who was Wong Mun now dead. He went to the cemetery in a hack; that at the time of his mother's death, he was living at the place he had previously

(Testimony of George Hoon Leong.)
described on Beretania Street; that he had two sisters and a brother and that the brother died; that he was the oldest of the four children and his sister, Leong Sing Hee, is the next oldest and she is now living in Canton. The third oldest, also a girl, was Leong Kam Hou, who is married and lives in Honolulu and her married name is Mrs. K. T. Hou. The fourth child, a boy, is dead; his name was Leong Tai Hin. He died in Kalihi Camp. Asked how he happened to be at Kalihi Camp, said "That was just after the fire (1900) and the Chinese people got to be taken to the Camp—probably for health purposes". The fire called the "Great Fire" wiped out the witness' home where he had resided. The whole family went to this camp, where the youngest child died. There were no other children. He testified that his father died in China about nine years ago and that the three remaining children had lived with the father [86] after the mother's death and continued to live with him up to 1922 when the father went to China and died; that during all the time that he remembered, while his mother was alive and while he lived with his father, he never heard from either of them that there were any more children whose mother was Tom Shee, his mother, than the children he had named. Asked if his mother's remains were still in the Manoa Chinese Cenetery, he said they were in China today; that in 1917, the witness went to the Board of Health and got a permit "and then I had a Chinese with me, and then

(Testimony of George Hoon Leong.)
we disinterred her, and then it was left at the house in the Cemetery * * * until I was ready to go, which was in 1920". The witness was shown a document, a pink slip of paper and asked if that was the disinterment permit obtained from the Board of Health in Honolulu and he answered that it was and the same was offered and admitted in evidence as U. S. Exhibit No. IV, said

U. S. EXHIBIT IV

being as follows:

"BOARD OF HEALTH

"Disinterment Permit No. 572.

"Honolulu, March 30, 1917

"To the Superintendent of Manoa (Chinese) Cemetery:

Permission is hereby given for the Disinterment (the grave to be properly refilled) of the remains of TAM SEE, Age 38 years; Sex Female; Nationality—Chinese Died June 19, 1899 Cause of Death Consumption.

(Signed) "M. H. Lemon
Registrar General, Territorial
Board of Health.

(The words underscored are printed form, the balance written in. Photostatic copy of said U. S. Exhibit No. 4 being attached hereto and made a part hereof.)"

(Testimony of George Hoon Leong.)

He was then asked if he had ever seen Lau Hu Yuen (who was present in court) before coming to court and he said he had never met him before and that he was no relation to him.

On cross examination, he was asked what effort he had to use to get the disinterment permit from the Board of Health and [87] he said he didn't have to make any effort; that he just went down to the Board of Health and stated that he wanted to have his mother's remains taken to China. He was asked if he simply asked for a permit and they gave it to him and he said: "Well, I have to state where I work and I think they take my word as good as anything".

On redirect examination he was asked, with reference to the date of his mother's death and obtaining such date, to-wit, June 19, 1899, from the records of the Board of Health, said he had gone to the Board of Health and told them that his mother had died a little before the plague fire "and they traced it up through Tom Shee and my father's name was on the record and therefore they gave the permit to me"; that he had given the Board of Health the name of his father and mother and told them she had died before the plague fire and in that way the Board of Health traced it. That he wanted to have mother's remains returned to China, and he went to the Board of Health authorities about the time of his mother's death, which was a few months previous to the plague fire, which he

(Testimony of George Hoon Leong.)
remembered, his mother's name and his father's name, and they issued him a permit. In response to the court's question, the witness fixed from his own knowledge the date of his mother's death about six months prior to the plague fire.

TESTIMONY OF LUKE CHAN.

The witness, Luke Chan, being first duly sworn, testified on behalf of appellee as follows:

That he is a salesman for the American Factors; that he is the Secretary of the Manoa Chinese Cemetery, the Chinese name of the Manoa Cemetery being Lin Yee Chung. Shown a book [88] and asked what it was, he said it was a record of burials at the Manoa Chinese Cemetery, a record kept in the usual course of business of that cemetery; that this book was made in 1927 and covers all the records of the burials from the old books copied into it and is the only record now left of the cemetery. The witness said he did not know what had become of the records which were copied into the book shown him and he did not know "because it has changed hands almost each year". He testified that L. Akau is treasurer and custodian of all the records; that L. Akau is on Kekaulike Street in Honolulu, employed at Wing Fat Company. He testified that he did not know whether the original records of the cemetery are not in exist-

(Testimony of Luke Chan.)
ence and that L. Akau has been custodian of the records about ten years.

Q. Do you know whether or not these records have been in this same form for that period of time, that is, been in bound volumes like that?

A. No, it is a new book.

On cross examination, the witness was asked if he knew whether the books exhibited to him contain a correct record of all the burials made in the cemetery back to about 1900 and he answered he didn't know. Asked if there was anything written in one of the fly-leaves of the book relative to that and he said there was. Asked to read it, he said for disinterments up to 1927 the numbers are irregular and that after that date "it's right". He was then asked: "Do you know of your own knowledge whether or not that's a complete and correct record of the burials in Manoa Cemetery" and he answered: "I don't know; I can't tell".

TESTIMONY OF MARY HESTER LEMON.

The witness, Mary Hester Lemon, being first duly sworn, testified on behalf of appellee as follows: [89]

That she is employed in the office of the Board of Health as Registrar General of Births, Deaths and Marriages, which office has records of births,

(Testimony of Mary Hester Lemon.)
deaths and marriages in the Territory and she is the official custodian of the same; that she brought with her documents with reference to deaths during the year 1899, which is a book and is an official record of the Board of Health of the Territory of Hawaii of deaths. She was asked if she had a record of the death of Tom Shee during the year 1899 and she said she had.

Mr. Moore for the appellee at this time asked that what appeared in this book marked January 1898 to April 1900 with reference to the death of Tom Shee be read into the records so that the books could be returned to the Board of Health. It developed from this witness' testimony that under the column marked "date" appears the date "June 19, 1899". Under the column entitled "name" appears the words "Tam See", and that the column entitled "Sex" contains the letter "F", which denotes "female" and the column entitled "Age" has the figure "38" denoting the age of decedent at the time of her death and in the column marked "Nationality" appears the word "Chinese" indicating that decedent was a Chinese person and in the column entitled "Ward" appears the figure "4", which would indicate the woman died in the fourth ward or section in Honolulu, with reference to which, the witness said: "I would presume, under the column 'remarks', that it would be around Beretania near Nuuanu Street". It was further shown that the record gave as "Cause of Death" "Con-

(Testimony of Mary Hester Lemon.)

sumption'' and in another column under the words ''Attended by'' appears the words ''Dr. Un Fong''; that under the column ''Cemetery'' appears the word ''Manoa'' and under the column ''Remarks'' appears ''Bert. near Nuuanu''. That the information put into the column entitled ''Remarks'' has reference to the locality of the death of the woman. [90]

Further questioning this witness, she was asked on direct examination: ''In the columns entitled 'Cemetery' and 'Remarks' and over the words 'Manoa' and 'Bert. near Nuuanu' appears in red, 'Permit to disinter issued March 30th, 1917, for removal to China'.''

Q. * * * Do they keep records with reference to disinterment permits?

A. Yes.

The witness thereupon produced a small book which she said contained the stubs of the permits issued during the year 1917 and that she had signed the permits to which these stubs belonged. She was then shown U. S. Exhibit 4 and said that it was the usual form granted in cases where disinterment was requested and that U. S. Exhibit 4 appeared to be the original issued from the stub she had produced with reference to Tam See. The witness testified that she had issued this permit in 1917 and made the whole entry herself except the initials by the Secretary of the Board of Health put on it when

(Testimony of Mary Hester Lemon.)
she turned over the $2.50 to him. In lieu of putting the stub in evidence, Mr. Moore, for the appellee, read the same into the record as follows:

> "2.50" in figures; "Geo. H. Leong"; printed "Disinterment Permit No. 572"; date of issue "Mar. 30, 1917"; name "Tam See"; sex "F" age "38"; nationality "Chinese"; date of death "June 19, '99"; cause of death "T. B."; cemetery "Manoa".

Then stamped and written across the face of the stub appears

> "Received fee 2.50"; initialed "K. B. P." dated "March 31, 1917".

The witness was then asked if, during the year 1899, there was a record of any other death of a person named "Tam See", "Tom Shee", or anything that euphonically sounded the same and she answered in the negative. She was asked if there was a record in prior years of someone similar in name and she answered [91] in the affirmative, giving the name of one, Tam See, who died June 13, 1898, a female Chinese, 31 years old, died in the fourth ward of fever attended by Lau Song Kai, buried in Pauoa Cemetery and after "Remarks" the word "Kapukolu"; that a disinterment permit had been issued August 27, 1904 to remove the body to China. That she had searched the records and that other than the two names mentioned she had found no record within any reasonable time of anybody by the name of Tom Shee.

(Testimony of Mary Hester Lemon.)

On cross examination, she was asked if she knew whether or not the record of deaths occurring in Honolulu in the years 1898-1899-1900 were complete and she said yes. And in answer to the question: "You know it contains all of them?" she replied that she would infer that it does; that it did as far as she was able to say, though this was not of her own knowledge as such records were made before her time. She said the regulations of the Board of Health require burial permits.

TESTIMONY OF JESSIE LEONG HOU.

The witness, Jessie Leong Hou, being first duly sworn, testified on behalf of appellee as follows:

That her Chinese name is Leong Kam Hou, her maiden name was Kam Hou Leong; that her family name was Leong; that she is thirty-nine years old; born in Honolulu and is engaged in the ladies-ready-to-wear business; that her husband's name is K. T. Hou, cashier and vice president of the Liberty Bank in Honolulu; that she was born in Honolulu and her mother's name was Tam See (she said the Chinese character that stands for "Tom" also stands for "Tam" and the Chinese character that stands for "Shee" also stands for "See"); that her mother was not living but died when the witness was very young; her father told her her mother died before the fire in 1900, but she has no personal recollection

(Testimony of Jessie Leong Hou.)
of her mother; that her father's name [92] was Leong Ming, whose married name was Leong Din Moon; that she remembered her father and that he is now dead; that she had one older brother and one older sister living and that her brother was present in court (George H. Leong, a previous witness, stood up in the courtroom and was identified by the witness as her brother); said that she had one younger brother who died; she recalled him very faintly; that his death occurred while he was still an infant; that her living sister's name is Leong Sang Hee who is unmarried and now residing in Canton, China; that she didn't know the name of her brother who died as an infant; did not know the circumstances concerning his death; that she was an infant at the time and was born in 1895; that her mother was buried in the Manoa Chinese Cemetery and she died a few months before the great fire in 1900; that she attended her mother's funeral and could personally recollect that event; that after her mother's death, she lived with her father in Honolulu up to 1916; that in that year she went to Los Angeles where she lived a year and was married and returned to Honolulu and living with her husband. She testified that her mother's remains were disinterred and were taken to China in 1920 or 1921. She was living in Shanghai at the time. After returning from Los Angeles, she testified, she remained in Honolulu until 1920, then went to China

(Testimony of Jessie Leong Hou.)
and that her brother went to China either in 1920 or 1921; that she went to China before her brother. She testified that all the time that she was living in the Territory, she never heard of her mother, Tam See, having any other children than those she had named as her brothers and sisters and that there is living only one brother. Lau Hu Yuen was pointed out to her in the courtroom and she was asked if he was related to her and she answered in the negative. She said that the Chinese native village of her parents was Lung Yit Tau. [93]

On cross examination, she said she did not remember exactly how long it was before the great fire that her mother died and hardly remembered her mother at all and did not remember her younger brother who died. In response to a question by the court, the witness testified that having gone to China in 1920, she returned to Honolulu in the Summer of 1921.

TESTIMONY OF LEE KAU.

The witness, Lee Kau, being duly sworn, testified on behalf of appellee as follows:

That he is engaged in the business of selling chickens and merchandise under the name of Wing Fat, on Kekaulike Street; that he is the treasurer of the Manoa Chinese Cemetery, a cemetery known under the Chinese name of Lin Yee Chung and he has held this office for three or four years, but

(Testimony of Lee Kau.)

never was an officer before that time. Asked if he had anything to do with the records of the cemetery, he said that "only take possession of this book (indicating); I keep record".

Q. You're the custodian of this book?

A. Yes.

(Mr. Moore indicating the same book that was testified to by witness Luke Chan.)

The witness said that the book had been turned over to him as custodian at the time of Leong Wah Hin's retirement, between 1929 and 1930; that he thought Leong Wah Hin is still in the Territory of Hawaii but doesn't know what he is doing at the present time or where he lives nor does he know how long he had been custodian of the book before it was turned over to him, the witness. He was asked what the book was and replied it was a record showing Chinese that were buried in the Manoa Cemetery. Said that he did not know who actually compiled it; that it had gone through over ten persons' hands. He was asked if he was not the custodian of all the records of the cemetery and replied [94] that he had possession of the records showing the expenditures and the income of the association.

Q. Well, how about books of this kind, the record of burials up there in the cemetery, are you the official custodian of those now?

(Testimony of Lee Kau.)

A. Yes, some; and some I copy them into this book.

Q. Some you copied into this book?

A. Yes.

Q. Where did you copy them from?

A. From records that were issued of the parties who died, and we have the duplicate, and we copied that—transferred the record from the duplicates.

Q. In other words, you've given the original to the person interested in the particular death and have kept a copy of that in your possession, is that it?

A. Yes.

Q. And after you get through making this copy into this book, what do you do with the copy that you got the information from?

A. I keep them after I get through making the transfer; but those that were kept by others I do not know.

The witness was asked what period of time was covered by the copies he had and he said they covered the period from the time he came into office, which he thought was in 1930, and that the purpose of taking the information that is on the copies and putting them in the book was to make a permanent record for the Chinese cemetery. The witness said that the copies from which he got his information to put in the book, he had received during his term

(Testimony of Lee Kau.)

of office and some of them he still had, some but not all. He explained that some of these copies might have been misplaced due to the fact that they were old and he also said it was not of any use to keep these copies after the information had been entered in the book; that he did not know how the record had been kept by his predecessors in office. [95]

Questioned further as to the custodianship of the records, he was asked:

Q. Mr. MOORE: Well, are you the official custodian of all the records with reference to the entries in this book; that is, from the source of the information to the book itself?

A. No.

Q. Do you know whether or not the copies of which these entries were made in this book prior to your time in office are still in existence?

A. I do not know.

Q. Well, if they were in existence would you know it, or not?

A. I do not know where they are.

He said his immediate predecessor was Leong Wah Hin and that Watt King was the latter's predecessor; that Watt King is dead; that Watt King had been treasurer of the association prior to 1927. The witness was asked if he, as custodian, of the kind of records covered by the book had any knowledge of the existence of any other records than those contained in this book covering the year 1899, and he

(Testimony of Lee Kau.)

answered that he did not know: "It's forty-one years now."

The witness was again shown the book and identified it as the record of the Manoa Cemetery containing the names of the persons "that have died and the persons named in this book that have died".

At this point Mr. Hogg, counsel for appellant, said: "Before that question is answered I would like to have read the statement on the fly-leaf there". The statement on the fly-leaf was in Chinese writing and a recess was taken during which the same was translated and when court reconvened the translation from the fly-leaf of said book was given as follows: [96]

> "There is some discrepancy in connection with the numbers under which those who have been buried in this burial ground of this association prior to 1927, but subsequent to the end of 1927, they are correct. If any countryman wants disinterment, please pay attention."

The witness then testified that he had taken care of the book during the period from 1929 to 1930 and had "put numbers in its record" when he kept it during those years and stated that while he was taking care of it, the numbers were entered consecutively; that such numbers referred to the number of the burial plots in which various people were buried in the cemetery; that there are no other numbers referred to in this book other than the numbers of

(Testimony of Lee Kau.)
plots and consequently the numbers referred to in the book relate to burial plots. He was asked if there was any record in the book as to burial of Tam See on June 19, 1899, and after examining the book, he testified that it showed the burial of Leong Tom Shee, June 19, 1899.

TESTIMONY OF FRED E. ARNOLD

The witness, Fred E. Arnold, being recalled, previously sworn, testified on behalf of appellee as follows:

That he was an immigration inspector at the port of Honolulu on November 1, 1934, and on that day made an investigation with reference to Lau Hu Yuen in connection with this application for a Certificate of Citizenship as a native of the Hawaiian Islands. He said that later on, November 27, 1934, made another investigation questioning Lau Hu Yuen, proceedings being taken down by a stenographer and later transcribed. Questions were asked in English and interpreted to Lau Hu Yuen in Chinese by Interpreter Tom Hoon. The witness was shown two documents and asked if he knew what they were and answered they were transcripts of testimony given by Lau Hu Yuen in his application for Certificate of Citizenship. With reference to signing the interrogation, the witness was asked on what Lau Hu Yuen signed and answered that he signed the stenographer's [97] notebook before it

(Testimony of Fred E. Arnold.)

was typed. The statements were marked for identification "U. S. Exhibits E & F for identification"; "E" being the document dated November 1st and "F" being the document dated November 27th.

TESTIMONY OF TOM HOON.

The witness, Tom Hoon, being first duly sworn, testified on behalf of appellee as follows:

That he was the official Chinese interpreter of the Immigration Service and occupied such position November, 1934; that he knows Lau Hu Yuen and that on the 1st day of November he acted as interpreter for Mr. Arnold in connection with appellant's application for a Certificate of Citizenship of the Hawaiian Islands; that he is Chinese and for twelve years attended a Chinese school, eleven years in the Territory and one in China; both reads and writes Chinese and speaks Heung Shan and Har Kar dialects; that he talked to Lau Hu Yuen on November 1, 1934, and that the latter speaks Heung Shan and that he interpreted to the best of his ability the questions asked Lau Hu Yuen by Mr. Arnold, translating the same from English into Chinese and the answers from Chinese into English to the best of his ability; that on November 27, 1934, he acted as interpreter again in connection with Lau Hu Yuen's application, interpreting in the same way as previously; that there was a stenographer present on

(Testimony of Tom Hoon.)

November 1st, Miss Holland, and Miss Beese on November 27th, both stenographers being employed with the Immigration Service.

TESTIMONY OF MISS NELLIE HOLLAND.

The witness, Miss Nellie Holland, being duly sworn, testified on behalf of appellee as follows:

That she is a stenographer and clerk at the Immigration Station in Honolulu and has been in the Immigration Service about ten years and has followed the trade of stenography for fourteen [98] years; that on November 1st, 1934, she acted as stenographer in connection with Lau Hu Yuen's hearing on his application for Certificate of Citizenship and took down in shorthand the questions and answers, the questions as given and the answers when translated from the Chinese into the English by the interpreter; that after taking this statement down she transcribed the same. The witness was shown U. S. Exhibit E for Identification and stated that was the case of Lau Hu Yuen which she reported on November 1st, 1934; that the same was a true transcript of the hearing, to her knowledge and belief. She was asked if Exhibit E for Identification was signed by appellant. She testified that he had signed her stenographic notes and after she had transcribed them, she had traced his signature on her transcription.

(Testimony of Miss Nellie Holland.)

U. S. Exhibit E for Identification was offered in evidence, objected to by counsel for appellant and the objection sustained.

TESTIMONY OF TOM HOON.

The witness, Tom Hoon, being recalled, previously sworn, testified on behalf of appellee as follows:

That he had an independent recollection of the questions propounded to Lau Hu Yuen on November 1st in connection with the application for a Certificate of Citizenship for the Hawaiian Islands and he had an independent recollection of the answers given. He was asked if there was any question as to this appellant's parentage and he stated there was.

With leave of court Mr. Hogg, counsel for appellant, examined the witness with reference to whether he read the typewritten copy of the interrogation of November 1, 1934, and the witness stated that he had not nor had anybody read or explained it to him. That they are not allowed to read the official records in the United States Immigration Service. [99]

The witness was then asked, over objection and exception of appellant, to give "what testimony you can of this defendant at that hearing relative to his parentage" and he answered that Lau Hu Yuen claimed that his mother was Tom Shee and died in

(Testimony of Tom Hoon.)
Honolulu on Beretania near Nuuanu on June 19, 1899, at the age of 30 and that Lau Hu Yuen gave his father's name as Lau Ah Chew, who died in China in January, 1934. The witness said that Lau Hu Yuen stated that his mother was buried in Manoa Cemetery and that her remains were removed to China in C. R. 6; "that's equivalent to the American dated 1917". That Lau Hu Yuen claimed he was born on the Chinese date equivalent to the American date August 11, 1897. The witness didn't remember whether Lau Hu Yuen said anything about the place of his birth. Referring to the testimony given by Lau Hu Yuen, November 27, 1934, the witness said that on that occasion Lau Hu Yuen claimed that his mother, Tom Shee, died in Honolulu on Beretania Street near Nuuanu Street "on the Chinese date equivalent to the American date June 19, 1899" at the age of thirty years and her remains were shipped to China on the Chinese date equivalent to the American date March 30, 1917, by Lung Doo Chung Sin Tong and that in China her remains were buried in Lung Tau Wan Village, Heung Shan District, China, and that the disinterment permit was obtained by Lung Doo Sing Tong, the same society that had handled the shipment of her body to China; that his mother had died of tuberculosis.

TESTIMONY OF MILDRED BEESE.

The witness, Mildred Beese, being duly sworn, testified on behalf of appellee as follows:

That she was employed as a clerk and stenographer at the Immigration Station at Honolulu and was employed there on November 27, 1934, at which time she acted as stenographer of a hearing conducted by Immigration Inspector Arnold when Lau Hu Yuen was under examination. She produced her stenographic notes taken on [100] that occasion and was asked if, during the interrogation, Lau Hu Yuen was asked to state the name of the attending physician in connection with the death of his mother. The witness answered that she didn't know whether such question had been asked or not.

TESTIMONY OF LEONG WAH HIN.

The witness, Leong Wah Hin, being first duly sworn, testified on behalf of appellee as follows:

That he is an officer connected with the Manoa Chinese Cemetery and that for a time had something to do with the records of the cemetery relating to persons buried there. He believed this was in 1928. He was shown the Manoa Cemetery book which was now marked "U. S. Exhibit G for Identification" and asked if he had anything to do with the compilation of this book, he answered in the affirmative saying that he had "copied the words in there". Asked if he had copied the words from

(Testimony of Leong Wah Hin.)

beginning to end or only a part, he said he copied only a part. His attention was called to page number six and asked if he had copied "this that's on page 6" and he answered in the negative and said that had been done by Leong Yit Cho and that he had directed Leong Yit Cho to make the copy and had paid him for the same and that he got the records which he copied into the book "from small books" and that he, the witness, had given these small books to Leong Yit Cho. The witness was shown a book and asked if it was the sort of book "that this man copied from into this U. S. Exhibit G?" This question was objected to, overruled and exception noted and allowed. The witness answered that the book copied from was a different kind, "a much smaller book, about ¼ the size of this". That he, the witness, had given the small book, while custodian of the books of the cemetery, to Leong Yit Cho. He was asked what those books contained and he said that they contained the names of persons who had died, the date of death and place of burial, the place of burial being designated by number; [101] the number referred to a particular burial plot in the Manoa Cemetery of the Lin Yee Society in which the witness was an officer. He was asked:

Q. Where were these books kept?

A. In those boxes (indicating).

He explained that after he ceased being custodian, they were in the custody of Mr. Chun Hoon; that

(Testimony of Leong Wah Hin.)

while the witness had their custody he was treasurer of the society. He was asked if he had these "parcels" (indicating books and records of the cemetery association) while he was treasurer and answered in the affirmative and said that he knew what the word "custodian" meant; that when he was treasurer of the Chinese Cemetery his duties were to receive money, issue out burial papers. Asked what sort of burial papers were issued out, he said, "both in Chinese, and the permit issued by the Board of Health". He was again asked what sort of papers were issued out in Chinese and he answered "like this (indicating the small book)". He said that prior to his term of office permits for burial were issued in Chinese and that when he was in office in the cemetery association, the records of the association were in his possession and that during his term of office no one but himself had custody of the records; the witness having them all. He was asked if he knew how far back the records went and he answered "I do not know how far back they went, but I just make the copy from what I have." With reference to copying the records, he was asked if he copied them himself or somebody else copied them and he said that some he copied himself and some were copied by somebody else. He was then asked what he copied the records into and he said he copied it "in this book" (indicating). And asked into what the other person had copied the records, he

(Testimony of Leong Wah Hin.)

said the other person had also copied them in the same book. (U. S. Exhibit G for Identification). The witness was asked to [102] describe the appearance of the oldest of "these sort of records" that he had of the cemetery association and he answered that they were "similar to promissory note books". He was then shown an ordinary school composition book which had the number "1" on the outside and asked if he had ever seen it before and he said he had not, nor had he ever seen a book like it. He was then shown another paper-bound book and asked if he had ever seen anything like that before and he said that he had but that it was not in any way similar to the oldest records of the association of which he had spoken before. He was then asked to step down from the witness stand and look into two boxes which contained various books and records of the association to see if he could find any of the "records, oldest kind that you know of". He looked through the records in the boxes and, returning to the witness stand, he was asked if he had found in the boxes "any of the sort of oldest records that you had when you were an officer there" and he answered in the negative. He was then asked what was done with the records after they were copied into the books by the man that he had directed to make the copying and he replied that the man had delivered them back to him and that when they were delivered back to him he had "laid them aside, seeing that they were not of any great use". Laying

(Testimony of Leong Wah Hin.)
them aside he put them close to the boxes and never paid much attention to them thereafter and doesn't know now where they are. When he ceased being treasurer, he took the records and put them in his store and thereafter delivered them to Chun Hoon. Asked specifically what he delivered to Chun Hoon he said "all documents in connection with the Lin Yee Society". He was then asked if those documents were "these old records you have spoken of" and he said he did not know. He was asked the whereabouts of these two boxes at the time he put the old records alongside of them and he said they were in his store [103] on Maunakea Street, a store which he no longer has. In delivering the records to Chun Hoon took him "nothing else but this book". As far as the records were concerned, which he placed near the boxes, these he laid aside temporarily since he considered them of no use and after his store was closed he did not know what happened to them. His store had been closed by creditors and he has never been back there since. When the creditors closed his store the records were there and he has never seen them since.

TESTIMONY OF CHUN HOON.

The witness, Chun Hoon, being duly sworn, testified on behalf of appellee as follows:

That he is a merchant in Honolulu engaged in the fruit and vegetable business and is president of the

(Testimony of Chun Hoon.)
Manoa Chinese Cemetery. He was asked if he had any papers or anything belonging to the association and he said "all those documents in the boxes were given to me"; some were given by Watt King and some by Leong Wah Hin. Indicating two iron boxes in the courtroom, the witness was asked if he had possession of these iron boxes and he answered in the affirmative; that they were in the same condition as they were when he received them from Leong Wah Hin. Asked what Leong Wah Hin gave him, he answered that he had given him miscellaneous documents, which were placed in the iron boxes and all the documents Leong Wah Hin gave him were in the boxes. In other words, the boxes contained everything that Leong Wah Hin gave him. He was asked if he had ever seen the book before him (U. S. Exhibit G for Identification) and he said he had but the same had never been in his possession as that book was taken care of by the treasurer and the witness was the president of the association. The witness was asked if he had ever taken anything out of the boxes received from Leong Wah Hin and he said "No; I don't know Chinese anyway" and that so far as he knew when he brought them to court they were in the same condition as he had received them from Leong Wah Hin. [104]

On cross examination, he said he had not given Leong Wah Hin a receipt for the documents nor was a list made out and signed by him, or by any other person; that the boxes were kept while he had

(Testimony of Chun Hoon.)
them on a shelf in his store, were not locked and he did not know whether anybody had taken anything out of them or not, but that nobody else had access to them but himself, but further pressed said he did not know of his own knowledge that no one had "interfered with those boxes" while he was absent from the store. The two boxes were marked for identification "U. S. Exhibits H & I for Identification".

TESTIMONY OF LEONG WAH HIN.

The witness, Leong Wah Hin, being recalled, previously sworn, testified on behalf of appellee as follows:

That he is in the grocery and merchandise business, his store located at Thomas Square, King Street, Honolulu. He was asked if he knew what a certain thing was and he said "those are the stubs after the burial papers have been issued". He was then asked if the burial papers, which were issued, had any connection with the stubs prior to their issuance and he said that before the burial papers were issued the books were longer and contained the burial paper and the stub and the burial paper was torn from the perforated edge of the stub. The paper that was torn from the stub was delivered to the Board of Health by the relative of the decedent. He said the treasurer had charge of the issuance of the permits and if the decedent happened to be a

(Testimony of Leong Wah Hin.)
member of the association no charge was made but if he was not a member a $10 charge was made. When the permit was issued a record was kept of it by the treasurer of the association and he kept the record "in boxes". Explaining the procedure incident to the issuance of a burial permit, the witness said a relative of the decedent would make a report of the death and the time of death and a record was kept after a permit was issued. The witness was then asked: [105]

Q. What are those little books that are up there on the Bench in front of you?

A. Duplicates of burial permits.

The burial permits were for the Manoa Chinese Cemetery and the witness did not know the period of time they covered. He was asked if by looking at the books he could tell the time they covered and he said he could and was given an opportunity and said that the books began with 1893 and ended with 1928. He said he had had possession of the books, and, shown one of the books, asked if there was anything in the book that he, the witness, particularly did with it, answered that "those letters and marks in red are my writing".

Q. That's "1893 to 1898" and the final "1" over here?

A. Yes.

He said he had examined all the books before coming to court and that similar numbers to that pre-

(Testimony of Leong Wah Hin.)
viously explained appear on each of the books and that he put the numbers on them when he was treasurer, which he thought was during 1927 or 1928; that he had received the books from Watt King, who is now dead, who had preceded him as treasurer of the cemetery association, and as such treasurer Watt King was the custodian of the records during his term of office. At this point in the proceeding, Mr. Moore, counsel for appellee, made the following statement and offer:

> "Mr. MOORE: At this time, may it please the Court, we produce these various books to show the continuity, and particularly offer the first book that the witness looked at, which has in red pencil number '1', and the figures '1893 to 1898' and more particularly in that book, at a page that is now marked with a cardboard—I don't believe it has any number on it—it's written in Chinese, and I don't believe the Court can very readily read it. We have a translation down here of that particular page into English, and if Mr. Hogg wants to check the translation that we have with any interpreter or Chinese scholar, or anything, we're perfectly willing he may do so."

Mr. Hogg, counsel on behalf of appellant, objected to the admission of the book saying: [106]

> "* * * That this book purports to contain dates between 1893 and 1898, which is prior to

(Testimony of Leong Wah Hin.)

any issue in this case, and for that reason we submit that it's immaterial, irrelevant and incompetent. We're not here to prove the records of the Manoa Cemetery; we're not here to establish any fact connected with those records; the fate of the Manoa Cemetery is not in issue in this case; it's simply a question of whether this defendant is entitled to be and remain in the United States; and the integrity of the records of the Manoa Cemetery, or the alleged records of the Manoa Cemetery, is in nowise material. Furthermore, these books have not been properly authenticated; it hasn't been shown who made the entries or by whom they were made or when they were made or how they were made, whether they were made by an official, by a gardener, by a grave digger or by somebody not connected with the cemetery at all. In other words, there's nothing connected with the book, as I understand it, and as I understand the law, that authenticates the books or identifies them and being what this witness says they are, and this witness only knows about those books from what he had been told—merely hearsay; I object to the admission of the books into evidence."

Without ruling on the offer at the time, the court took over the witness and the following proceedings were had:

(Testimony of Leong Wah Hin.)

"The COURT: What is the date of the first record in here; because one says here '1893 to 1998', on the face of it shows that it's an error; what is the date of the first entry in that book?

A. June 15th, 1893.

Q. What is the date in the last entry?

A. January 18th, 1898.

The COURT: What is the—we take up so much time, but there seems to be no way out of it—what is that day (indicating)?

A. December 25th, 1905.

The COURT: What is this one (indicating)?

A. July 14, 1906.

Q. What is this one (indicating)—indicating another page?

A. July 26, 1900.

The COURT: In this case I am showing the witness the page succeeding the page marked by the cardboard. What is the date there?

A. July 8th, 1890.

The COURT: Did he say '1990'? [107]

INTERPRETER: 990.

(Immigration Service interpreter comes up to witness stand and starts an attempt at interpretation).

The COURT: This man is the witness here; I'm not interested in what the other interpreter states; I'm interested in what is in that book.

A. 99.

(Testimony of Leong Wah Hin.)

Q. Let me see the other one; showing the witness the page immediately preceding the one with the cardboard.

A. May 25th, 1899.

A recess was called at this point so that counsel with interpreter could "look at this (book) as to the date for any further objection if they want to make it". But before the recess began, counsel for appellee asked leave to ask the following question of the witness:

Mr. MOORE: Doesn't it say up here the 99th year?

The COURT: He's already said that it did, Mr. Moore.

A. Yes, 99.

The COURT: Let me have the book.

Q. Showing the witness the page immediately succeeding the page in which is inserted the cardboard—what is the date?

A. Year of 99, July 8th.

Mr. Moore asked the witness if he knew Wai Nam and the witness answered that he had heard the name but did not know the person and in response to the court's question said he did not know who Wai Nam was. The witness was then asked if he was custodian of these books at the present time and answered that he was not and he did not know who the custodian was. The witness was then withdrawn and Chun Hoon was recalled to the witness stand.

TESTIMONY OF CHUN HOON

The witness, Chun Hoon, being recalled and having been previously sworn, testified on behalf of appellee as follows:

He was asked: [108]

> Q. Showing you a number of books here in front of you, have you ever seen those books before?
>
> A. They were given to me and I placed them in my place.
>
> Q. Whom were they given to you by?
>
> A. I think they were turned over to me either by Mr. Watt King or Leong Wah Hin.

He said Watt King was dead now; that he was once treasurer of the Manoa Cemetery and that Leong Wah Hin kept records of the accounts of the association "and also record of those who were buried in the cemetery and was a director of the association".

The witness was asked if he knew what officer of the cemetery association is the custodian of the records and answered that at the present time the custodian of the records of the association was Lee Chee Chan. Asked what office Lee Chee Chan held, the witness said "he is an accountant". Indicating the books produced in court, the witness was asked how long the books had been in his (witness') custody and answered six or seven years and he was then asked if he knew a man by the name of Wai Nam and he said he did and that

(Testimony of Chun Hoon.)
Wai Nam was dead. Asked if Wai Nam ever had any connection with the cemetery, he said that Wai Nam was at one time a director. Asked if just prior to Wai Nam's death, he was connected with the association, he answered he was "serving in a position similar to a directorship" just before he died where he performed the duties of a director. He did not know whether Wai Nam had anything to do with the issuance of burial permits, because when Wai Nam was an officer he (witness) was not. In concluding his direct examination the witness said that the two persons who turned over the books to him some years ago, one was dead and the other was present in the court room. The one present in the courtroom he indicated as Leong Wah Hin. [109]

On cross examination the witness said he did not know how to read or write Chinese, never having gone to school. Asked how he knew "those were books that were at one time turned over to you" he answered: "They were delivered to me but I didn't know what they were; I never touched them before". That when Leong Wah Hin was out of office "he turned them over to me, and I (witness) put them in my store".

He said that when the books were turned over to him, he did not know what they were, "I just simply placed them over there", and that he placed them "in a box next to a small box on the shelf"; a wooden shelf in his store next to his desk. The

(Testimony of Chun Hoon.)
box was unlocked; that the box had not been in the custody of anyone else since he took possession of them. His attention was then called to a statement he made a moment before to the effect that an accountant had possession of certain property of the association and he was asked what property that was. He answered that the accountant had the book from which the burial permits were issued; the only book the accountant had.

On redirect examination he stated that this accountant was Lee Chee Chan, present in court and that Lee Chee Chan was now the treasurer of the association.

TESTIMONY OF LEE KAU.

The witness, Lee Kau, being recalled and having been previously sworn, testified on behalf of appellee as follows:

That his other name was Lee Chee Chan; that he was the one identified by Chun Hoon in the courtroom a moment before; that he is at present the treasurer of the Manoa Cemetery Association and as such is the custodian of the record. As such treasurer he has custody of the following records, quoting from his answer: "Burial permits, cash book, that takes care of receipts and disbursements; and the checks when issued would be signed by myself and Mr. Chun Hoon". He also testified that he had custody of the [110] burial permit books

(Testimony of Lee Kau.)

which he had brought into court. His attention was then called to U. S. Exhibit G for identification and asked if he knew what the books were, he answered as follows: "It's the record that shows those persons who have died". And he said that he was custodian of that book. The witness was shown the number of small books on the Judge's bench and was asked if he had ever seen them before, to which he replied that he had not and that they had never been in his custody.

TESTIMONY OF GON SAM MUE.

The witness, Gon Sam Mue, being first duly sworn, testified on behalf of appellee as follows:

That he is employed at the Immigration Station; that he knows Chun Hoon; that on the preceding day, he visited Chun Hoon's store. The purpose of the visit was to ask him if he had any other books than the one "he had already given to us". He testified that he had found the books covered by U. S. Exhibits H & I for Identification at the store; that he, the witness, understands Chinese writing to some extent. He was then asked:

Q. I'll ask you to check this particular page and see if that is the page that refers to plot or grave—plot number 58?

A. The page which you showed me indicates that there was a plot number 58.

(Testimony of Gon Sam Mue.)

Mr. MOORE: What name appears on there as being buried there?

Mr. HOGG: Well, may it please the Court, until this book has been admitted as evidence, until it's been sufficiently identified that it can be admitted as evidence, has been properly authenticated, I object to any of the contents of it going into the record of this case.

The COURT: The contents, Mr. Hogg, as you should know, is not going in for the purpose of proving its verity, but it's instigated by the Court for some sort of an identification to show that the particular page in question was not identified simply by a cardboard slip. This is not admitted for the purpose of proving that that was there, but for indicating the page that is in controversy; whether it be admitted at all is of later concern.

Mr. HOGG: It's being read into the record, and my contention, may it please the Court, is you can't [111] prove the admissibility of a book by the contents of one page in it.

The COURT: We're not proving the contents of the book. The question of it being in is not in; it's just the same as in the ordinary proof for identification—that the paper marked "Honolulu Advertiser", January 26, 1921,—then the matter for identification comes in later; but it is to identify the page in question and has nothing to do with the truthfulness or admissibility, but it's for identification.

(Testimony of Gon Sam Mue.)

A. The name Leong Tom Shee appears on this page.

Q. And that page has been heretofore spoken of as the page with the cardboard in it?

A. Yes, sir . . .

Mr. MOORE: Now, may it please the Court, we will tender to the Court what purports to be a translation of this particular page, so that, in considering the offer of this particular book as to that page, the Court can see its materiality.

Mr. HOGG: May it please the Court, we object to the admission of that page, or any page in that book, or the book itself, until——

The COURT: That isn't the question; he's not offering the page in question.

Mr. HOGG: Then might I ask what it is for?

The COURT: For the purpose of the Court deciding the materiality of the page if it is otherwise admissible. Mr. Hogg, here's the proposition: There is a book written entirely in Chinese. For the purposes, we'll assume that you're going to object to it. and I assume that you will, and that one of the objections will be as to its materiality; it's impossible for the Court to know that unless the Court is advised as to what is in that page. If the translation would show that that was the burial of "A" in

(Testimony of Gon Sam Mue.)

1932, that would settle the question and we wouldn't have to decide anything else. It's impossible for the Court to know whether it is or is not to be considered.

Mr. HOGG: Well, may it please the Court, I don't want to be disagreeable in this matter; I'm trying not to be; I am trying to protect this client's interest; but I can't see how you can identify or determine the materiality of a page of the book unless the book itself has been properly authenticated; how do we know anything about what this is; there are a number of pages——

The COURT: That isn't in; that isn't the question, as to whether it's admissible or whether it's been authen- [112] ticated; it's so the court will know in advance whether to simply throw it out on its being immaterial.

Mr. HOGG: May I object, may it please the Court, that until those books have been authenticated and identified and proven to be the correct records of the Cemetery that there isn't any page of it that's admissible for anything under any conditions.

The COURT: Assuming they have been properly authenticated; assuming that they have been authenticated in every one of the ways which you have indicated; it would still be impossible for the Court to pass one way or another unless he knows what is contained in

(Testimony of Gon Sam Mue.)

the page. If the thing on its face shows that it has no bearing, it wouldn't make any difference whether it had been authenticated or not. It's not for the matter of proof. However, I think that you should find out whether counsel will stipulate that that is a proper translation of those books, because unless that is stipulated or verified I would still be right where we started.

Whereupon the court took a recess to permit counsel for the defendant to find out whether the translation offered was correct.

When court reconvened, the following colloquy occurred between the Court and counsel for the defendant:

The COURT: Will counsel for the defense admit that this is a correct translation of that page?

Mr. HOGG: May it please the Court, individually, I don't know. The interpreter for the Court—one of the interpreters or both of them from the Immigration Station—and the gentleman who has been here with my client, say that this translation is correct. I don't care to make any admission concerning it, may it please the Court, because I object to its consideration as evidence and on the ground that it isn't properly authenticated.

(Testimony of Gon Sam Mue.)

The COURT: Well, the question of admission isn't in. The question is whether or not this is a correct translation of that page, so that the court may be informed whether or not it is admissible.

Mr. HOGG: Is the content of this going into the record?

Mr. MOORE: No.

The COURT: No.

Mr. HOGG: Just for the benefit of the Court?

The COURT: Just for the benefit of the Court.

Mr. HOGG: For that purpose I'll admit that it's correct. [113]

The COURT: Before that's definitely in the record; if the page in question is admissible, then it would go in as a translation.

Mr. HOGG: That's all right. That isn't under consideration at the present moment?

The translation was then exhibited to the court. Mr. Moore for the plaintiff then made the following offer:

"At this time, may it please the Court, we offer in evidence this stub book which I have heretofore referred to, and it's the one which has been referred to here in the testimony as having a cardboard at a certain page; it is the same stub book that I referred to this morn-

(Testimony of Gon Sam Mue.)

ing as having marked on it, on the first page, the figure '1' in red pencil, and having upon the inside of one side of the cover '1893 to 1998' that's just for the purpose of identification . . .

Mr. HOGG: May it please the Court, we object to the introduction of the book as such, on the ground that, outside of this particular page especially, it's immaterial, incompetent, and irrelevant, and has no connection with anything or any issue in this case. As to this identical page, we object to it on the ground that it is not properly authenticated, not properly proven, hasn't been established that its merits or has the quality necessary to entitle it to be admitted in this case as evidence. We object to this, further, on the special ground that it's immaterial, irrelevant, and incompetent, exactly, that it is not properly authenticated, it is not authenticated in a way that entitles it to be admitted as evidence in this case.

The Court overruled the objection and admitted the book in evidence saying, in part:

"Having taken such a long time to get to this point, I feel that very briefly this Court should state its reasons for the ruling. On the face of the instrument it shows that it is 35 years old. It was brought in from the hands of the custodian; it had been shown to have been in the hands of the treasurer for some

(Testimony of Gon Sam Mue.)

time, until the copies were made, rendering the necessity for the keeping that record by that particular official no longer necessary; the copies were not admitted in evidence; the book itself has the appearance of age; the books with which it was connected had the appearance of age, though not as great as the one in question; from the Court's examination of this particular book it was shown that there are purported interments in the Manoa Chinese Cemetery running from 1894 to 1904, if I remember rightly, or 1906. I do not remember whether I asked for the first page or the last page; I took certain pages indiscriminately, showing records over a period of some years of that time; then I tòok the page immediately preceding the page in question, and that [114] showed a date shortly prior to the date in question; and I took a page immediately succeeding that page and it showed a date slightly subsequent to the date of this page, which was June 19, '99' year, as given here" . . .

"The book will be admitted in evidence with particular reference to the page upon which appears 'Plot 58', 'June 19', and the year '99'."

The COURT: It having been stipulated that the translation that the court has is the correct translation of what appears on the page, it will be admitted with the book as the translation of the page in question.

(Testimony of Gon Sam Mue.)

The court then gave the following instructions with reference to the book and translation of the page mentioned:

> The COURT: Without closing the book, will you hand it to the Clerk and have him initial it, at the top of the page, and a like initial at the top of this translation, in addition to his Court records that goes on them. Same will be admitted.

Photostatic copy of the outside cover of said U. S. Exhibit 5 and photostatic copy of said page referred to, bearing the initial "W.F.T." of the Clerk of Court, being attached hereto and made a part hereof, and the translation of said page, which was stipulated to be a correct translation, being as follows:

> "Heung Shan district, Dai Jee Doo, Lung Yit Tow village This is to certify that Leong Tom Shee (wife of Din Moon) who died on June 19. She was a member of the Association and should be permitted to be buried at Association Plot No. 58.
>
> Free of charge
>
> 99 Year June 19 th — Lin Yee Tong
>
> By Wai Nam."

(The words underscored are printed form, the balance written in).

To which admission the Appellant duly excepted.

LAU HU YUEN, alias LAU CHOCK WAH—APPELLANT'S CASE.

TESTIMONY OF EDMUND H. HART.

The witness, Edmund H. Hart, being first duly sworn, testified on behalf of appellant as follows: [115]

That he is Assistant Librarian of the Archives of Hawaii and among his duties are included the care of the old manifests of vessels arriving and departing from Honolulu prior to 1900. He produced the manifest of the S. S. Doric outward bound from Honolulu for Yokohama and Hongkong November 24, 1899. These old manifests are kept in the Archives. The witness was asked if the manifest shows the names of passengers departing on that ship and the witness answered "there is a list of names". He was then asked specifically to state the name that appeared on page 2, the 12th or 13th from the top of the page. The witness answered that on Line 12, spelled out "Ah Chu"; on line 13, spelled out "Child". On cross examination he testified that the manifest did not show the destination of passengers.

TESTIMONY OF LAU HU YUEN.

The witness, Lau Hu Yuen, called as a witness on his own behalf, being first duly sworn, testified as follows:

That his other name was Lau Chock Wah; that he was born on Beretania near Nuuanu Street;

(Testimony of Lau Hu Yuen.)
that he was born "14th day of the 7th Moon, 23rd K.S." (August 11, 1897). He said that he knew that he was born on that date and at the place testified to because his father told him so, whose name was Lau Ah Chu, whose other name was Chun Ing; that his mother's name was Tom Shee who died the 12th day of the 5th moon, 25th year K.S. (June 19, 1899); that she died on Beretania and Nuuanu Streets; that he knew that she died there because his father told him; that he had no personal recollection of his mother. Asked when his father first told him as to the death of his mother and the place of her death, he answered "he always told me". Asked what he did after his mother's death, he said that his father took him to China. Asked if he knew that boat on which he sailed for China, he answered the Doric leaving here the 22nd day of the 10th moon, K.S. 25 (November 24, 1899); that his father, arriving in China, took him to their village named [116] Lung Two Wan where he lived with his father. His father died in 1924. At the time of his father's death, the witness was in Honolulu, having returned to Honolulu in 1923 as a passenger on the S. S. President Pierce. Before returning to Honolulu, the witness said he worked in a drygoods store in Sak Ki; that he began working there when he was around twenty years old, Chinese count. Asked where he was working in C.R. 6 (1917) he said in Sak Ki. He was asked if he knew what became of the remains of his

(Testimony of Lau Hu Yuen.)

mother after she died in Honolulu and he said they were sent back to China; that she was first buried in Manoa and that her remains were taken back to China in C.R. 6 (1917) and that he was in China working in the drygoods store at Sak Ki at the time. When he worked in the drygoods store, he also made the store his living quarters, returning to his father's village about once a week. He said that when his mother's remains arrived in China he was in the Sak Ki Village. After their arrival they were buried, according to the information he received from his father, in the rear of Lum Two Wan Village, although he had not seen them himself. He said that he did not have any personal recollection of his mother and what information he had was given him by his father; that he did not remember his mother's death. He did not attend his mother's burial in China and all he knew about his mother's death and burial in Honolulu was what his father told him and the same was true with reference to his knowledge of the arrival of her remains in China and the subsequent burial there.

On cross examination, he was asked where he went to work after his arrival in Honolulu in 1923 and he said at Lai Cheong, a drygoods store in Honolulu located, at the time, on Kukui Street; that was ten years ago and he did not remember the street number. He is now the owner of his own store on River Street, a store he purchased in the latter part of 1934. Before that he had

(Testimony of Lau Hu Yuen.)

worked in a vegetable garden, having an interest in a hui or company known as [117] the Kwong Yick; that he worked for Lai Cheong about a year; after that he engaged in selling vegetables for himself as a street peddler and he continued doing this seven or eight years; next he worked in a vegetable garden at Moiliili in Honolulu in which he had an interest. He continued in this work for over a year and following that bought his store on River Street. This is a store that deals in wholesale and retail produce which he bought last December. He was then asked if he remembered leaving Honolulu November 24, 1899, and he answered: "I remember my father told me". He was then asked:

> Q. Is that the only way you remember, or do you have a distinct individual recollection yourself?
>
> A. After my father had told me I remembered it.

He said his father did not tell him anything about Hawaii. The only things he told him was that his mother died here; that he, the witness was born in Hawaii and that his mother was buried in Manoa Cemetery and that later on in 1917 her remains were brought back to China; that his father did not tell him where his mother was born, nor did he tell the witness who his mother's parents were, nor has he ever obtained that information. He said that he did not know when his mother first came

(Testimony of Lau Hu Yuen.)

to Hawaii; that his father never told him when she first came to Hawaii and he did not know how long she had lived in Hawaii; that his father never told him when he, the father, came to Hawaii, or the name of the boat on which he came, but he did tell him that they lived, when in Hawaii, in the vicinity of Beretania and Nuuanu Streets and that he had "always told" the witness of his birth in Honolulu; that he had told him the place of his birth on several occasions but he couldn't remember the exact number; that he also told him of his birth in Honolulu before he left China for Honolulu in 1923, just when before he did not remember. He said that when he left China in 1923 he knew he would be examined at the Immigration State before being admitted; that his father from time to time had told him of his mother's death in Honolulu, her burial and the witness' birth in Honolulu and the removal of her remains to [118] China, and had mentioned these facts to him within the year before he left China for Honolulu. "He always told me", the witness added. He was then asked if he knew his paternal grandparents and he answered in the affirmative and gave the name of Lau Ah Sing as his grandfather, whose other name was Koon Chong. He gave his grandmother's family name as Chong or Cheong, who was, according to Chinese custom known as Chong See; that he had never seen his paternal grandparents; that they had been

(Testimony of Lau Hu Yuen.)
dead a long time and living today they would be close to a hundred years old; that they were buried in the Lum Two Wan Village; that he did not know the names of his maternal grandparents or the place of their burial; that Sak Ki City is three or four miles, or an hour's walk, from Lun Tow Wan Village; that he went home weekends as a rule, but sometimes did not if he was too busy. When his mother's remains, having been brought back to China, were being buried, he was not at the cemetery but was in the store; that he did not know of their arrival in China until after the burial had taken place; that after this burial in China, his father informed him of having brought the remains to China and their burial in the village plot. He was asked who disinterred his mother's body in Honolulu and said "Might be by Chung Sing Tong; I do not know, because my father didn't tell me." He was asked if he remembered testifying at the Immigration Station on November 27, 1934, and he said he remembered the occasion but didn't remember what he had said. Then he was asked:

Q. Weren't you asked this question: Who had your mother's remains removed from the cemetery?"

A. Yes; I answered to that question that it was perhaps through Chung Sing Tong.

Q. Wasn't your answer direct to this effect: "The Lung Doo Chin Sing Tong Society"?

A. I answered "Perhaps it was the Lung Doo Chin Sing Tong Society".

(Testimony of Lau Hu Yuen.)

He was then asked what his father did in Hawaii and he answered that his father was a tailor and never told him where his place of business was and he had never asked him. Said his father told [119] him that he was a tailor but didn't tell him that he had a store, merely that he made his livelihood by tailoring. He did not tell him who he worked for, or how much he made out of tailoring, or what kind of clothes he made, and did not mention anybody that he worked with in the tailoring business; that his father died in 1924 in the Lung Two Wan Village; that the witness was in Honolulu at the time of his death and his father the witness believed was sixty-six years old at the time of his death. The witness was asked if he recalled testifying at the Immigration Station when he arrived in 1923 and he answered in the affirmative and was then asked if he remembered that he had given his father's names as Lau Ah Chew also known as Lau Chun Ung and he answered that Lau Chun Ung was the name and that he gave his age as sixty-five. He was then asked if he remembered testifying at the Immigration Station in November of last year and asked if he remembered:

> "Q. What is your father's age, occupation and whereabouts? and he was asked if he answered as follows: 'He left Hawaii K.S. 25-7-22, which, in American count, is August 27, 1899, and he died January 1, 1934, at Lung Two Wan

(Testimony of Lau Hu Yuen.)

Village, Yuen Shan District, China, at the age of 76 years; that he was a tailor'?

A. I did not. In my answer I said my father left here K.S. 25, 10th moon, 22nd day.

Q. And then this answer I just made to you, you did not make at the Immigration Station?

A. I did tell them that he left here on the 10th Moon, the 22nd day, K.S. 25.

Q. Then you deny that you told the immigration authorities on the occasion that we're now speaking of, that your father died on January 1st, 1934, at the age of 76 years?

A. I deny that."

He was asked if he told the immigration officers his father was a tailor and he said he had. He was asked if his father had been a tailor all his life and he said he was not a tailor after he returned to China; that in China he raised vegetables and rice; that his mother was 38 years old when she died, according to information the witness had received from his father. Asked what kind of illness she suffered on the occasion of her death, he said: "I [120] think she die of 'T.B.' as my father told me". He was asked if he knew the exact date of the disinterment of the remains of his mother and he said he did not; that as far as he knew her remains arrived in China on the 8th day of the second second Moon, C.R. 6 (March 30, 1917) from information his father had given him. His father had told

him this when the witness went home after the burial of his mother's remains and told him the same thing many times on other occasions. The witness was then asked with reference to the second time he was examined at the Immigration Station during November 1934.

> Q. Were you asked "Where was your mother first buried"?

He answered by saying that his mother was first buried in the Manoa Chinese Cemetery. He was then asked if he had not also been asked how long the remains had remained in that cemetery, and he denied that any such question had been asked him. Then he was asked:

> Q. Didn't you answer that her remains stayed there until C.R. 6, 2nd 2nd month, 8th day, which in our count is March 30, 1917?

And he answered that he had said that her remains were sent back to China on the 8th day of the 2nd 2nd month, C. R. 6. He was then asked:

> "Q. Did you make the statement that her remains stayed there . . . meaning Manoa Cemetery . . . until C. R. 6, 2nd 2nd month, 8th day?

And he answered: "I answered saying that her remains were sent back to China on the 8th day of the 2nd 2nd month C. R. 6."

The Court at this point intervened:

> The COURT: "In answer to the question 'How long did her remains stay in the ceme-

(Testimony of Lau Hu Yuen.)

tery' did you, or did you not answer: 'Her remains stayed there until C. R. 6, 2nd 2nd month, 8th day'?"

A. "I did not answer in that way."

The witness was then asked that if in connection with his admission the basis of his claim was entirely from what his father [121] had told him and he answered in the affirmative. He said that of his own knowledge he didn't know who his mother was, his knowledge of her was gained only from what his father told him; that as far as the place of his birth was concerned that he had to depend upon what his father told him, and the same as to when his mother died and the cause of her death and the place of her burial. He was asked if when his case was being heard by the Board of Special Inquiry in 1923 if he didn't have a witness named Lau Kwai who is now residing in Honolulu and another witness by the name of Wong Pan Hin, also living in Honolulu, to which he answered affirmatively. He was asked if these two men went to the Immigration Station with him in 1934, when he was seeking a Certificate of Citizenship of the Hawaiian Islands and he said he did not know, but they did not go with him. He was asked if there was any other Tom Shee "that you claim to be the son of other than the one they referred to in the evidence in this case" and he said he had only one mother who died, according to the information his father

(Testimony of Lau Hu Yuen.)
gave him, on June 19, 1899, and that this Tom Shee, who he claims as his mother died of tuberculosis, was buried in the Manoa Cemetery, disinterred and her body arrived back in China March 30, 1917. He was asked if the witness George H. Leong and the witness Mrs. Hou were relations of his and he said they were not; that he had never seen either of the people before they appeared in the case. He was asked after his arrival here in 1923 if he had made any investigation to find out where his mother had died and he said he had not, nor had he made any investigation to find out what she had died of, the place of her burial or with reference to her disinterment. He was asked if had ever heard of the Board of Health and he said he had and knew where it was and indicated where it was. He was asked how many times he had been over there and he said he had never been in the building. His attention was called to the fact that marriage licenses were issued in that building and he recalled that he had been there to get a marriage license, but while getting a [122] marriage license he had not asked for any records of any kind with relation to his mother; that he had not made any endeavor to find if the information he had received from his father was true concerning his mother; that he has no picture of his mother, nor has he ever seen one; he did not know what she looked like because he was so young at the time of her death. Asked if it wasn't a Chinese custom to

(Testimony of Lau Hu Yuen.)
have pictures of parents and forefathers in the home and the witness said: "Not everybody can afford to have. Only rich people can afford to have." He was then asked if he had had any pictures of his forefathers or his mother in his home village in China and he said he had not. He was then asked if he ever visited the grave of his mother in China and he said he had. He was asked how soon he made the visit after he learned from his father of the burial there and he said the following Chinese Decoration Day which happens once a year, which next occurred about ten months after she was buried in China; that the cemetery where his mother is buried is at the rear of the village just at the edge of the village.

The Defendant rested.

UNITED STATES—APPELLEE'S REBUTTAL.

TESTIMONY OF TOM HOON.

The witness, Tom Hoon, recalled on behalf of appellee in rebuttal, and having been previously sworn, testified as follows:

The witness' attention was called to November 1, 1934, when he was acting as Chinese interpreter at the Immigration Station when Lau Hu Yuen was examined and he was asked:

(Testimony of Tom Hoon.)

Q. Mr. MOORE: At that time, that I just spoke of, do you recall this question and answer: "What is your father's age, occupation and whereabouts?

A. He left Hawaii K.S. 25-7-22, the American count being August 27, 1899, and died January 1, 1934, at Lung Tow Wan Village, Heung Shan District, China, at the age of 76; he was a tailor"?

The witness answered: "Yes".

He was then asked: [123]

Q. Now, referring to the same proceeding at the Immigration Station, or that under date of November 27, 1934, was this question and answer given by this defendant: "Q. Where was your mother first buried? A. In the Manoa Chinese Cemetery"?

A. Yes. He did.

"Q. How long did her remains stay in that cemetery? A. Her remains stayed there until C. R. 6, 2nd 2nd month, 8th day, American count March 30, 1917"?

And the witness answered in the affirmative.

The above and foregoing is all the evidence necessary for consideration by the United States Circuit Court of Appeals for the Ninth Circuit on appeal heretofore allowed herein introduced at the trial of

the said cause and all proceedings had in the trial thereof. The portions of the testimony above set out verbatim are necessary to a proper determination of said appeal.

The parties hereto incorporate by reference plaintiff's Exhibits 1 to 5 inclusive to all purposes as if the same were set out in words and figures herein.

WHEREFORE, Lau Hu Yuen, alias Lau Chock Wah, appellant above named, prays that the above statement of evidence be settled, approved and allowed by the above entitled court as a true, full and correct statement of all of the evidence taken and given on the trial of said cause, for use on said appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit, and said appellant further prays that the above entitled court direct that the verbatim testimony contained in the foregoing statement of evidence shall be reproduced in the exact words of the witness, as in said foregoing statement of evidence.

Dated: Honolulu, T. H., this 10th day of September, A. D. 1935.

E. J. BOTTS

Attorney for Appellant above named. [124]

City and County of Honolulu,
Territory of Hawaii—ss.

E. J. BOTTS, being first duly sworn, on oath, deposes and says: That he is counsel for appellant above named; that he has read the foregoing Statement of Evidence and that the same is true, complete and properly prepared and that the repro-

duction of the portions of the testimony therein set forth verbatim is necessary for a proper determination of said cause on appeal.

(S) E. J. BOTTS

Subscribed and sworn to before me, this 10th day of Sept., 1935.

[Seal] GLADYS K. BENT

Notary Public, First Judicial Circuit, Territory of Hawaii.

On the 13th day of September, A. D. 1935, the foregoing narrative statement of the evidence having been presented to me, and respective counsel having been heard in the premises, the same is hereby allowed and approved and declared and certified to be true, complete and properly prepared, and the same is ordered filed as a "Statement of the Evidence" to be included in the record on appeal in the above entitled cause, and a verbatim reproduction of the portions of the evidence included in the foregoing statement being necessary to a proper determination of said cause on appeal, IT IS FURTHER ORDERED that the testimony hereinabove set forth verbatim shall be so reproduced in making up said record on appeal, all as provided by paragraph b of Equity Rule 75.

Dated: Honolulu, T. H., September 13th, 1935.

(S) EDWARD M. WATSON

Judge, United States District Court, in and for the District and Territory of Hawaii. [125]

IT IS HEREBY STIPULATED that the above and foregoing Statement of Evidence is true and correct, and that the reproduction of the portions of the testimony herein set forth verbatim is necessary for a proper determination of said cause on appeal, and the same may be forthwith approved by the Judge.

(S) E. J. BOTTS
Attorney for Appellant.
(S) JEAN VAUGHAN
Assistant U. S. Attorney,
Attorney for Appellee.

Receipt of a copy of the foregoing STATEMENT OF EVIDENCE is hereby acknowledged, this 10 day of September, A. D. 1935.

(S) JEAN VAUGHAN
Assistant U. S. Attorney
Attorney for Appellee.

[Endorsed]: Filed Sep. 13, 1935. [126]

[Title of Court and Cause.]

NOTICE.

To the United States of America—Plaintiff; and to Miss Jean Vaughan, Assistant United States District Attorney:

You will please take notice and are hereby notified that an amended Statement of the Evidence in the above entitled matter has this day been filed in

the office of the Clerk of the United States District Court and the same will be presented for approval to the Honorable E. M. Watson, Judge of the United States District Court in and for the District and Territory of Hawaii on Friday, the 13th day of September, 1935, at the hour of 10:00 o'clock in the forenoon of said day.

Dated at Honolulu, this 10th day of September, A. D. 1935.

(S) E. J. BOTTS
Attorney for Defendant above named.

Receipt of a copy of the foregoing NOTICE is hereby acknowledged, this 10th day of September, A. D. 1935.

(S) JEAN VAUGHAN
Assistant U. S. District Attorney. [127]

[Title of Court and Cause.]

PRAECIPE.

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare a transcript of the record in this cause, to be filed in the Office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said record the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Statement of the evidence.

3. All minute entries in the above-entitled cause.
4. Petition for appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Citation on appeal.
8. Bond for costs on appeal.
9. Decision.
10. Judgment and order of deportation.
11. All exhibits (U. S. Exhibits 1 to 5 inclusive).
12. Clerk's certificate to record.

The foregoing record to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the Office of the Clerk of said Circuit Court of Appeals at San Francisco, in the State of California, before the .... day of ...., 1935. [129]

Dated at Honolulu, this 21st day of June, 1935.

(S) E. J. BOTTS

Attorney for Appellant. [130]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Territory of Hawaii—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered from 1 to 130 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office and I further certify that I am attaching hereto the original citation on appeal and that the costs of the foregoing transcript of record are $45.75 and that said amount has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said Court this 20th day of January, A. D. 1936.

[Seal] WM. F. THOMPSON, JR.,
Clerk, United States District Court,
Territory of Hawaii. [131]

[Endorsed]: No. 8116. United States Circuit Court of Appeals for the Ninth Circuit. Lau Hu Yuen, alias Lau Chock Wah, Appellant, vs. United States of America, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Territory of District of Hawaii.

Filed January 27, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the following pages in the above entitled record may be omitted from the printed record hereof:

Pages 4, 10, 43, 66, 68, 72, 74, 75 to 77 inclusive, 79, and 128.

Dated: Honolulu, T. H. This 21st day of January, A. D. 1936.

THE UNITED STATES OF AMERICA,
Plaintiff,
By SAMUEL SHAPIRO, Assistant.
Attorney for Plaintiff.
LAU HU YUEN alias LAU CHOCK WAH,
Defendant,
By E. J. BOTTS, his attorney.

[Endorsed]: Filed Feb. 13, 1936. Paul P. O'Brien, Clerk.

No. 8116

United States Circuit Court of Appeals

For the Ninth Circuit

LAU HU YUEN, alias LAU CHOCK WAH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLANT

FILED
APR 11 1936
PAUL P. O'BRIEN,
CLERK

E. J. BOTTS,
Stangenwald Building,
Honolulu, T. H.

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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No. 8116

United States
Circuit Court of Appeals
For the Ninth Circuit

LAU HU YUEN, alias LAU CHOCK WAH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLANT

I.
STATEMENT OF THE CASE.

This is a deportation proceeding under the Chinese Exclusion Act, brought against Lau Hu Yuen, a Honolulu resident whose citizenship has been recognized by the Immigration Bureau since 1923 when a Board of Special Inquiry admitted him to the Port of Honolulu, causing a Certificate of Identity to be issued attesting to his status. (R. P. 37).

It is now sought, in reversal of the familiar rule that courts cannot interfere with the fair decisions of immigration officers, to set at naught and vacate this 1923 judgment of the Board, because the momentarily incumbent immigration officers suspect it was wrong, though they did not themselves hear the evidence, see the witnesses or participate in the hearing. The trial judge obliged, and from his judgment this appeal is taken. (R. P. 66).

There is nothing new in this case to distinguish it from the string of kindred cases which have come before this court in a weary procession from *Ching Hong Yuk* (23 Fed. (2d) 174) to *Fong Lum Kwai* (49 Fed. (2d) 19), on appeal from the district court in Honolulu. It is, however, true in this case that the Government introduced, over objection, certain records of a local Chinese cemetery, upon some obscure theory they were binding on defendant, though he had had nothing to do with them and was unaware of their existence; but, as will be pointed out hereinafter, they were incompetent and amounted to nothing in the way of proof in support of the Government's burden.

A brief outline should be given here of defendant's 1923 hearing before the Board of Special Inquiry. He arrived from China in April of that year and a board composed of Harry B. Brown, Martha Maier and Louis Caesar was appointed (R. P. 19) to hear such evidence as he might produce concerning his right to admission as a Hawaiian-born citizen. No claim is made that this board was not properly con-

stituted, or that it did not act in good faith or that any undue or improper influence was exerted on it in behalf of the defendant.

The defendant testified at this hearing that he was born in Honolulu, that his father, Lau Ah Chew alias Lau Chun Ng, is still living and in China, that his mother Tom Shee, died in Honolulu "KS 25 5th month, 12th day", and that her remains were taken to China in "CR 6".

After testifying that he left here on the S. S. Doric when two years old, he described his village in China and supplied other details of his family history. (R. P. 19-22). Thereafter three witnesses were examined by the board touching defendant's Hawaiian birth. The first witness, Lau Yen, was asked, referring to Lau Hu Yuen:

"Q. Where was he born?
A. Beretania street near Nuuanu.
Q. How do you know?
A. I saw him here before about 2 or 3 months after he was born." (R. P. 24).

He further testified that defendant's mother died "KS 25 the 5th month", and that the defendant and his father went to China on the S. S. Doric. In the detention quarters he identified defendant and defendant identified him. (R. P. 25).

The second witness was Lau Kwai. He was asked concerning defendant:

"Q. Where was he born?
A. Hawaii—Beretania and Nuuanu.

Q. How do you know that?

A. I saw him a week after he was born." (R. P. 27).

He also described the defendant's family and his departure for China as an infant. The identification was mutual between defendant and witness.

The third witness, Wong Pan Hin, had learned of defendant's Hawaiian birth from the latter's father in China. His testimony revealed an acquaintance, not only with defendant but also with defendant's family, and in his case also the identification was mutual. (R. P. 32).

At the conclusion of the testimony, the board voted unanimously to admit defendant as Hawaiian-born. (R. P. 33). Thereafter, in due course, a Certificate of Identity was issued to him upon his application. (R. P. 35 and 37). He has since continued to reside in Honolulu.

In October 1934, defendant wished to make a visit to China and applied for the certificate issued to Chinese citizens to secure their reentry (R. P. 80); and questioned, as is customary before the issuance of such certificate, he informed the immigration inspector in charge that his mother was buried in the Manoa Chinese Cemetery. This was the first time he had ever mentioned the burial place of his mother. In his 1923 board hearing no reference had been made to it at all. The alert inspector dug up the ancient burial records of this cemetery, which heretofore had never been considered of any value in these cases,

and though he found a record indicating the burial of a Tom Shee as of the date of defendant's mother died, the descriptive matter contained in the record convinced him it pertained to a woman other than defendant's mother. (R. P. 126). The defendant was thereupon charged with having gained his admission by false and fraudulent representations and put to trial, with the result already indicated.

At the trial, defendant's original 1923 landing record, which contained the evidence upon which he was admitted, was introduced in evidence together with his Certificate of Identity. (R. P. 19-38). Having done this, the Government proceeded to put on evidence to show that a certain Tom Shee, who was buried in the Manoa Chinese Cemetery, was not the mother of the defendant but was the mother of certain children who still reside in Honolulu. (R. P. 91-92-93). When the Government rested, the defendant took the stand and testified at great length and with minute detail concerning his birth in Hawaii and family history. (R. P. 127-138). No claim is made that there was any material discrepancy in this testimony. In it he emphasized the fact that his information regarding the date of his mother's death and place of burial was in the nature of hearsay, for when these events occurred he was still an infant in arms less than two years old. (R. P. 128).

II.

ERRORS RELIED UPON.

The assignments of errors specified by appellant are ten in number (R. P. 68), but a determination of seven will dispose of the questions presented by this appeal. These assignments are here presented in the number set forth in the record:

> "2. That the court erred in denying defendant's motion made at the conclusion of plaintiff's case to dismiss the complaint herein and to discharge defendant, for the reason that the evidence adduced by plaintiff wholly failed to establish by requisite evidence the allegations therein contained, to-wit: that said defendant had gained his admission into the United States by false and fraudulent representations and claim of United States citizenship and that he was not lawfully entitled to be and remain in the United States."

> "3. That the court erred in admitting in evidence in the above entitled matter plaintiff's Exhibit IV, being a disinterment permit and in considering the same as evidence material in support of the charge contained in the complaint that defendant had gained his admission into the United States by false and fraudulent representations of citizenship."

> "4. That the court erred in admitting in evidence a certain stub book of the Manoa Chinese Cemetery Association (U. S. Exhibit V) and in considering the same as competent evidence in support of the allegations of the complaint herein that said defendant gained his admission into

the United States as a citizen by false and fraudulent representations."

"5. That the court erred in holding and deciding that said defendant had not sustained the burden of affirmative showing of his right to be and remain in the United States imposed upon him by the Act of May 5, 1892, Title VIII, United States Code, 284."

"7. That the court erred in presuming fraud in connection with the admission of defendant into the United States as a citizen thereof on April 30, 1923, and erred in refusing to accord to the proceedings before the Board of Special Inquiry which attended the admission of said defendant into the United States, as aforesaid, the presumptions of regularity, good faith and bona fides to which said proceedings were entitled."

"8. That the decision of the court in the above entitled matter vacating and setting at naught the decision and findings of the Board of Special Inquiry on April 30, 1923, was erroneous for the reason that the decision and judgment of the court in said matter was made in the absence of evidence establishing fraud and perjury on the part of defendant and his witnesses in their evidence before said Board of Special Inquiry in connection with defendant's admission into the United States, as aforesaid."

"9. That defendant, having been duly admitted at the port of Honolulu by a Board of Special Inquiry, which heard and considered the evidence adduced by defendant and his witnesses to establish defendant's Hawaiian birth and American citizenship, the court erred in vacating

and setting at naught the decision of said Board in the absence of a showing that said defendant and his witnesses conspired together and resorted to perjury before said Board to accomplish defendant's admission."

III.

ARGUMENT.

1. Opening statement.

The evidence before the Board of Special Inquiry in 1923, when defendant's citizenship was the issue, was positive, clear and convincing and not only warranted but required favorable action on the part of the Board. Anything else would have rendered the hearing unfair. (*U. S. v. Brough,* 22 Fed. (2d) 926). The inspector who initiated these proceedings questioned defendant's 1923 witnesses (R. P. 78), but refrained from calling them to the stand, presumably because their testimony would not benefit the Government's case. They were either truthful witnesses or were deliberate perjurers. If deliberate perjurers a fair inference would be that after a lapse of twelve years, when suddenly requestioned by an astute inspector, the false character of their 1923 testimony would have become patent. A perjurer cannot be expected to remember his fabrications indefinitely. Instead of proving these witnesses testified falsely, the Government merely undertook to prove that a certain Mrs. Leong Tom Shee, buried in the Manoa Chinese Cemetery, was not the defendant's mother. Page after

page of the printed record in this case is devoted to this contention. The Government built up a straw man to knock it down.

2. Ancient documents—must be competent.

One who reads this record, bearing in mind recent decisions of this court (*Fong Lum Kwai v. U. S.,* 49 Fed. (2d) 19; *Lee Choy v. U. S.,* 49 Fed. (2d) 24; *Choy Yuen Chan v. U. S.,* 30 Fed. (2d) 516; *Leong Kwai Yim v. U. S.,* 31 Fed. (2d) 738 and *Lum Man Shing v. U. S.,* 29 Fed. (2d) 500), must wonder upon what theory this case is prosecuted. The cases cited have made it abundantly clear that where the citizenship of a Chinese has been determined by a Board of Special Inquiry, satisfactory proof of fraud must be adduced to warrant rescission of the board's action.

In this particular case proof of fraud would necessarily involve a finding that defendant and his witnesses had committed deliberate perjury in their 1923 testimony. This is so because their testimony was positive and, in the case of at least two witnesses, was based on first-hand knowledge. So the concomitant of proof of fraud would be proof or perjury. This was the burden assumed by the Government, yet it made no effort to meet it by showing the witnesses were falsifiers. They had questioned them before the hearing of this case (R. P. 78) but chose not to call them to the stand, and no evidence was introduced to impeach them.

The Government merely put in evidence defendant's landing record and his Certificate of Identity and then

unexpectedly devoted itself, over objection, to a line of evidence relating to records covering the death of Mrs. Leong Tom Shee, concerning which some comment will now be made.

There is a Chinese cemetery in Honolulu known as the Manoa Chinese Cemetery, which has been in existence since 1894. (R. P. 125). It functions through a president (R. P. 107), a treasurer (R. P. 117), and presumably other officers including directors. (R. P. 116). The members of the association were apparently entitled to free burial, while a charge was made for those who were not members. (R. P. 110). Small books were printed, shaped something like promissory note books (R. P. 106), and from these permits were issued similar to U. S. Exhibit 5 (R. P. 126) authorizing a particular burial. It was not shown how many of these books were currently used, or what officers, beside the treasurer, issued the permits, or whether permits were issued for all burials. When these books were used up and nothing remained but the stubs they were thrown into iron boxes (R. P. 108) and no attention paid to them. In 1928 Leong Wah Hin, who was treasurer, became interested in collecting the data contained in these small books, copying it in one big book, and he engaged Leong Yit Cho to help him (R. P. 104), but the work was never finished, and most of the small books covering the early years of the association presumably were lost or destroyed. (R. P. 106 and 107). Leong Wah Hin said he left them in his store when the creditors closed it and he had never seen them since. (R. P. 107). At least

one small book survived and, over objection of defendant, a record was taken from it, indicating the burial in the cemetery in 1899 of Mrs. Leong Tom Shee.

This record was admitted in evidence on the theory it was an "ancient document". But whether ancient document or not, it obviously was inadmissible against defendant. Mrs. Leong was unrelated to him; he did not know her and the records of the cemetery were pure hearsay, so far as he was concerned. The ancient document rule does not mean, as the court apparently believed, that because a record is 30 years old it may, *ipso facto,* be admitted in evidence against a defendant. To be admitted, it must be otherwise admissible. The ancient document rule merely dispenses with the formalities of certain preliminary proof, concerning genuineness of the document. (*King v. Watkins,* 98 Fed. 913; *Cooper v. Williamson,* 191 Ky. 213; *Budlong v. Budlong,* (R. I.) 136 Atl. 308). The rule merely presumes the genuineness of the document. (*Gwin v. Calegaria,* 129 Cal. 384; 22 *C. J.,* p. 946).

Wigmore in his *1934 Supplement to his Treatise on Evidence,* Section 2145-a says:

> "The present principle (ancient document rule) deals only with the authentication of the document; whether the contents are material, or whether any statement or assertion contained in them is admissible for any purpose, should depend on different principles. Such statements may or may not be admissible under some exception to the hearsay rule, and their admissibility

must of course, depend upon the appropriate principle."

See also *King v. Watkins,* supra.

The burial record of Mrs. Leong had nothing to do with defendant and the court erred in admitting it, just as it erred in admitting various immigration records against a defendant in *Lee Choy v. U. S.,* 49 Fed. (2d) 25.

It is significant that the Government did not undertake to prove defendant's mother was not buried in the Manoa Chinese Cemetery, as defendant claimed. Not a scintilla of evidence was offered to refute defendant's testimony on this point. The utmost the Government proved was that Mrs. Leong was buried there and that she was not defendant's mother. Defendant never claimed she was his mother. He was a member of the Lau family, she of the Leong.

Even if this burial record were germane to the issues, it would be inadmissible upon this state of the record. There was no showing when the record was made, whether it was made contemporaneously with the events recorded, or made long subsequent, or that the information contained in it was obtained from trustworthy sources, or that the person making the record was under some obligation to do so, with no motive to misrepresent, or that it was a part of a system of entries, rather than a casual, isolated one. (See *Budlong v. Budlong,* supra). But of course, so far as defendant was concerned, it was hearsay and the court erred in admitting it and giving it important

if not controlling weight. We doubt if anyone would seriously argue that such a piece of loose, nondescript evidence could be admitted against a defendant in a civil suit, where his property rights are concerned or in a criminal case where his liberty is at stake, and we say it should not be admitted in a deportation case where *"perhaps all that makes life worth living"* for defendant is involved. (*Ng Fung Ho v. White,* 259 U. S. 276, 42 Sup. Ct. 492).

If this type of evidence may be used, then there is no reason why immigration officers may not deport practically any Chinese they choose who has been admitted here within the last decade or two, by finding in the ancient records of one of the several Chinese cemeteries in Honolulu, the name of a woman somewhat similar to the victim's mother, and then proceed as they did in this case. The danger of such *carté blanché* cannot be overemphasized.

3. Necessity of proof of fraud.

The trial court's decision (R. P. 41 to 65) reveals a distinct unwillingness to apply the rule so frequently applied in these cases (*Moy Kong Chiu v. U. S.,* 246 Fed. (7th) 94; *Fong Lum Kwai v. U. S.,* 49 Fed. (2d) 19; *Lee Choy v. U. S.,* 49 Fed. (2d) 24; *Ong Chew Lung v. Burnett,* 232 Fed. 853; *Lui Hip Chin v. Plummer,* 238 Fed. 763; *U. S. v. Hom Lim,* 214 Fed. 456 at 463), that where a Certificate of Identity is issued and a proceeding brought to eject the holder from this country, the burden is on the Government to show by evidence which the law recognizes as proof, that he obtained the certificate by fraud.

The trial judge's problem would have been very simple in this case had been willing to apply this oft-repeated formula. But apparently realizing there was no competent evidence of fraud, he picked out a casual word from a decision here and there, and finally wound up by making this wholly incorrect statement of the law.

> "The Certificate of Identity is prima facie evidence of the right of the defendant to be and remain in the United Staes, but is nothing more, and when such prima facie evidence is overcome by affirmative, legal, competent and admissible evidence which leads the court to believe the holder was not entitled to its issuance, the probative effect of the certificate is lost and defendant, being of Chinese descent, must establish his right to remain." (R. P. 53).

If the trial judge had simply said the obviously correct thing, that the evidence of the character described must prove fraudulent entry or illegal presence, he would have been correct, but he was endeavoring to gloss over the necessity of fraud being shown, which led him into a rank misstatement of the law. It is quite apparent that a federal court can only intermeddle in the administration of the Chinese Exclusion Act when the Chinese involved is illegally in the United States. The claimed illegal presence of the Chinese is essential to give the court jurisdiction; but, according to the trial judge, the federal court has jurisdiction where a Chinese though legally in this country is wrongfully in possession of a Certificate of

Identity—such as Chinese laborers, lawfully residing here but improperly in possession of merchants' Certificates of Identity. In such case the court has no jurisdiction whatever. The ample powers of the Immigration Bureau would handle that situation under rules prescribed for that purpose. (Rule 19, Governing Chinese, Department of Labor). See reference made to these rules in *Ching Hong Yuk v. U. S.*, 23 Fed. (2d) 174.

Before writing the quoted paragraph, the trial judge, as we said, taking a chance word from a decision here and there, expressed the opinion that proof of fraud was not necessary; the same result could be accomplished for "other valid reasons". What these other valid reasons were, he did not say and doubtless could not say; for fraud in one form or another is the necessary ingredient in the Government's complaint. And in this case, it was the rankest of all frauds—perjury—or it was nothing. It passeth understanding and defies logic to grasp the court's mental meanderings.

This chapter of his decision is but typical of the whole.

4. No burden on defendant.

The next surprising thing in the judge's decision was an animadversion against defendant because he did not call his 1923 witnesses. (R. P. 52). There appeared no reason why he should have called them. Their 1923 testimony was already before the court, uncontradicted and unimpeached. A party need not

call a witness merely to reiterate his previous testimony. Moreover, in this case the Government had the burden of proving fraud and unless it proved fraud, which it didn't defendant need do nothing more than offer in evidence his landing record and Certificate of Identity. It is absurd for the court to say that because defendant did not call these witnesses an inference should be drawn against him, when, in saying this, he knew that these same witnesses had been questioned by the Immigration officer who instituted these proceedings and that officer declined to put them on the stand! If an inference is to be drawn for not calling them then it must be drawn against the party who had the burden of proof. Their 1923 testimony is presumed to be truthful and correct.

5. Double standard of fraud.

The burden, as we have shown, was on the Government to prove fraud. Fraud is never presumed but must be proved by clear and convincing evidence, the most frequently used expressions being "clear, cogent and convincing", or "clear, unequivocal and convincing". (*Griffith v. Commissioner of Internal Revenue,* 50 Fed. (2d) 782 (7th C. C. A.); *Tucker v. Traylor Eng. & Mfg. Co.,* 48 Fed. (2d) 783 (10th C. C. A.); *Blakeslee v. Wallace,* 45 Fed. (2d) 347 (6th C. C. A.); *Maryland Casualty Co. v. Palmetto Coal Company,* 40 Fed. (2d) 374 (4th C. C. A.); *U. S. v. Mammoth Oil Co.,* 14 Fed. (2d) 705 (8th C. C. A.); 27 *C. J.* 62, Par. 199).

The trial judge was unwilling to apply this standard of proof to the case at bar. He readily conceded that

the proof of fraud, in a proceeding to take away his property, must be clear, cogent and convincing, but he was adamant in insisting that the *quantum* of such proof was immeasurably lower, where the issue concerned only the right of a lowly Chinaman to glean the meager enjoyments of his birthright. We turn from such a contention with pardonable nausea.

6. Departure and death records.

In practically all the Chinese deportation cases which have come before this court from the district court in Hawaii resulting in reversals, the claim has been made that the defendant used a death or departure record which did not belong to him. The worthless character of these death and departure records has been demonstrated time and again, the last times perhaps in the *Fong Lum Kwai* and *Lee Choy* cases, supra. The same claim is made as was made in those cases.

In the early days, when Hawaii was shifting from a monarchy to an independent republic, the records of births, deaths and marriages were so meager as to be "of very little value from a statistical standpoint". The quoted phrase is contained in the 1899 report of the President of the Board of Health to the President of the Republic of Hawaii. (Vol. 1, Territorial Reports, 1900, Archives of Hawaii).

If all deaths were reported during the period in question, it is impossible to say how many Tam Shees or Tom Sees or Tam Sees or Tom Shees—various authorized spellings (R. P. 47)—would have been

revealed. But even as it was, two were shown, a Tam Shee who died in 1898 at 31 (R. P. 90) and a Tom Shee who died 1899 at 38. (R. P. 88).

7. **Disinterment of defendant's mother.**

The defendant testified that the remains of his mother had been removed to China and the Government disputed that fact and undertook to show that a disinterment permit had not been issued for that purpose in the year 1917. The defendant never testified when his mother's body was disinterred—his testimony related only to when her body was returned to China. These two events—disinterment and removal to China—are frequently separated by substantial stretches of time. It appears to be the practice for the body to be disinterred and kept at some convenient place until a friend or relative is ready to take it to China. In the case of Mrs. Leong Tom Shee, her disinterment occurred in 1917 (R. P. 83) but her remains were not taken to China until three years later. (R. P. 84 and 92). The defendant living in China at the time would have no means of knowing when the body of his mother was disinterred. Moreover, while disinterment permits are issued by the Board of Health, no one familiar with the situation would seriously argue that disinterments are not frequently made without the formality of procuring a permit. And this was especially so in the early days of the Territory. In the annual report of the President of the Board of Health to the Governor in 1902, the following statement was made:

"Regulations of the Board of Health require a permit before any body can be exhumed; but no official is usually present that can be spared from the inadequate staff of the Board to enforce this regulation. Parties could, therefore, disinter any body without respect to the cause of death and send it to China and years after apply to the office for disinterment permit and the Board would be none the wiser." (Board of Health Report, 1902, page 304—Archives of Hawaii).

IV.

CONCLUSION.

It is respectfully submitted that the Government has wholly failed to prove the charge contained in the complaint, and that the decision of the trial court should be reversed and the defendant discharged.

Respectfully submitted,

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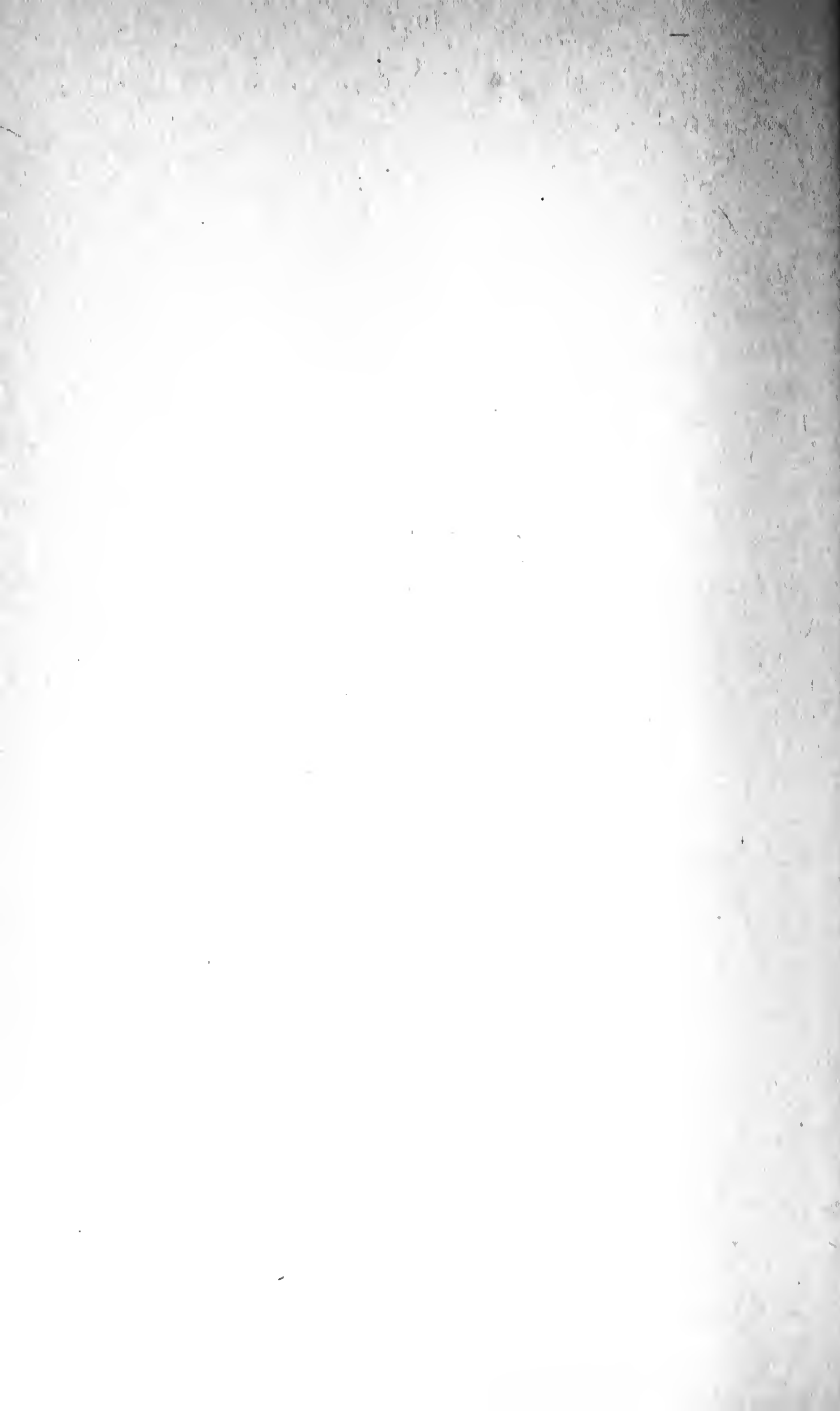
Attorneys for Appellant.



No. 8116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAU HU YUEN, alias Lau Chock Wah, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLEE.

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IN THE

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LAU HU YUEN, alias Lau Chock Wah,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This action arose upon a complaint for deportation under the Chinese Exclusion Act, Section 13, Act of September 13, 1888, 25 Stat. 479, 8 U.S.C.A. 282, filed on December 10, 1934, alleging that Lau Hu Yuen "on or about the 30th day of April, 1923, did unlawfully obtain admission into the United States at the Port of Honolulu by false and fraudulent representations and claim of citizenship made before the immigration officials at the Port of Honolulu", and "is not lawfully entitled to be or remain in the United States." (R. pp. 4, 5.)

This appeal is from an order of deportation entered on April 9, 1935, by the United States District Court for the Territory of Hawaii.

Lau Hu Yuen has been continuously resident in the Territory of Hawaii since his admission by a Board of Special Inquiry at Honolulu, T. H., on April 30, 1923. The facts presented in this case came to light as a result of the Appellant's application on October 20, 1934, to Immigration Officials for a "certificate of citizenship—Hawaiian Islands". (U. S. Exhibit No. 3, R. 38, 39.)

Since the Appellant was issued a Chinese certificate of identity (U. S. Exhibit No. 2, R. 36-38) on May 29, 1923, as a result of his admission as a citizen, the issues raised by the assignments of error are:

First, did the Government's evidence overcome the prima facie effect of this certificate of identity and of the action of the Board in admitting Appellant as a citizen, and thereby warrant the trial Court's action in holding the Appellant to the statutory requirement of establishing by affirmative proof to the satisfaction of the Court Appellant's lawful right to remain in the United States as required by Section 3, Act of May 5, 1892, 27 Stat. 25, 8 U.S.C.A. 284?

Second, did the Appellant sustain this statutory burden?

The initial question, then, is whether the record presents any "substantial evidence tending to impeach" the *correctness* of the certificate of identity, or "to show that the holder's status is other than what is certified": *Lum Man Shing v. U. S.*, 29 F. (2d) 500, 501 (C.C.A. 9, 1928). Or, as this Court later phrased the rule in 1929, whether the decision of the Board of Special Inquiry is in any wise "impeached for either

fraud or *error"*: *Leong Kwai Yin v. U. S.*, 31 F. (2d) 738, 739.

SUMMARY OF ARGUMENT.

I.

In the proceedings before the Board of Special Inquiry in 1923 Appellant claimed, among other things, that his mother was Tom Shee who died in Honolulu June 19, 1899, and that her remains were taken to China in 1917 and that he left Hawaii when two years old accompanied by his father. (R. pp. 19-33.)

II.

Appellant's claim of his mother's death in Honolulu was supported by a death record in the Board of Health. Without the element of corroboration afforded by the Board of Health death record of Tom Shee, Appellant's evidence of alleged Hawaiian birth before the Board of Special Inquiry in 1923 was inadequate. (R. pp. 33, 88, 19-33.)

Hung You Hong v. U. S., 68 F. (2d) 67.

III.

The Board of Health death record of the Tom Shee claimed by the Appellant as his mother was relied on by the Board of Special Inquiry in 1923 as referring to Appellant's mother. (R. pp. 33, 19-33.)

IV.

Since being admitted in 1923 Appellant has reaffirmed his claim that the Tom Shee mentioned in

the Board of Health record is his mother. (R. pp. 102, 127-138.)

V.

The Government proved that the Tom Shee mentioned in the Board of Health death record was not Appellant's mother and that no other person answering Appellant's description of his mother died in Honolulu at or within a reasonable time of the date of Appellant's mother's alleged death in Honolulu, thus proving that Appellant obtained his admission into the United States in 1923 by fraudulent representations of citizenship. The effect of this was to overcome the prima facie case for Appellant's citizenship created by the prior favorable action of the Administrative Board. (R. pp. 90-91.)

Young Mew Song v. U. S., 36 F. (2d) 563;
Ex Parte Wong Yee Toon, 227 F. 247, 252;
W. P. Walker & Co. v. Walbridge, 136 F. 19, 23;
Lynch v. Mercantile Trust Co., 18 F. 486;
26 *Corpus Juris* 1109, Sec. 39.

VI.

Fraud is not the sole ground for impeachment of the prior favorable action of the Administrative Board. The prima facie case for Appellant may be overcome by a showing of error, mistake or improvidence on the part of the admitting board.

Lui Hop Fong v. U. S., 209 U.S. 453;
Lui Hip Chin v. Plummer, 238 F. 762;
Lum Man Sing v. U. S., 29 F. (2d) 500, 501, 502;

Leong Kwai Yin v. U. S., 31 F. (2d) 738, 739;
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Lee Sai Ying v. U. S., 29 F. (2d) 108;
Dong Ling v. U. S., 30 F. (2d) 65.

VII.

The admission in evidence of the Manoa Chinese Cemetery record (the subject matter of Appellant's fourth Assignment of Error) was proper. This record is an ancient document. (R. pp. 124, 109-117.)

Barr v. Gratz's Heirs, 4 Wheat. (U.S.) 213, 217;
Johnson v. Jarvis, 223 F. 756, 758;
McGuire v. Blount, 199 U.S. 142;
Fulkerson v. Holmes, 117 U.S. 389;
Burns v. U. S., 160 F. 631;
William v. Conger, 125 U.S. 397.

Appellant cannot object to this record as being hearsay on appeal, not having objected on that ground in the trial Court.

Proffitt v. U. S., 264 F. 299;
Prudential Insurance Company of America v. Faulkner, 68 F. (2d) 676.

Even though Appellant's hearsay objection may be considered on this appeal, nevertheless, that objection is not applicable to this record since it comes within the "ancient document", "business entry" and "pedigree" exceptions to the hearsay rule.

Lewis v. Marshall, 5 Pet. (U.S.) 469, 475;
Hitchner Wall Paper Co. v. Penn. Ry. Co., 158 F. 1011, 1014;

E. I. Dupont DeNemours & Co. v. Tomlinson, 296 F. 635;
Central Commercial Company v. Jones Dusenberg Co., 215 F. 213;
Fulkerson v. Holmes, supra;
3 *Jones Commentaries on Evidence* (2d Ed.), 2108, Sec. 1147;
Stein v. Bowman, 13 Pet. (U.S.) 209, 219;
Gaines v. New Orleans, 6 Wall. (U.S.) 642, 699;
M'Claskey v. Barr, 54 F. 781, 784.

VIII.

Appellant cannot object to the admission in evidence of U. S. Exhibit No. 4, a disinterment permit, not having objected to its admission in evidence in the trial Court.

Boland v. Great Northern Ry. Co., 202 F. 485;
Cornett v. U. S., 7 F. (2d) 531.

ARGUMENT.

THE PROCEEDINGS BEFORE THE BOARD IN 1923.

The claim made by the Appellant in support of his American citizenship consists of representations made by him on three occasions before executive officers, all of which are in the record, to-wit, on April 28, 1923, November 1, 1934, and on November 27, 1934, which representations were reiterated for the most part on trial before the District Court.

When Appellant appeared before the Board on April 28, 1923, as an applicant for admission, be gave

his age as 26 years. He stated that he was born in Honolulu, at Beretania near Nuuanu Street, in 1897, and departed with his father, Lau Ah Chew, from Honolulu for China on the S.S. "Doric" on November 24, 1899 (KS 25, 10th month, 22nd day) when two years of age, and that he thereafter resided in his father's home village of Lung Tow Wan, in China. His father, he stated, is living in China and is aged 65 years. He stated to the Board, without qualification as to the source of his knowledge, that *his mother was Tom Shee, who died in Honolulu on June 19, 1899 (KS 25, 5th month, 12th day), and that her remains were taken to China in 1917 (CR 6).* U. S. Exhibit No. 1, R. pp. 18-22.

APPELLANT'S CLAIM OF HIS MOTHER'S DEATH IN HONOLULU WAS THE ONLY CORROBORATION FOR HIS ASSERTED HAWAIIAN BIRTH.

The Government's case consisted of an attack upon the Appellant's claim that he was the son of this certain and definite Tom Shee who died in Honolulu on June 19, 1899.

The record of the Board's proceeding in 1923 gives as a basis for its decision admitting Appellant as a citizen that the files of the Territorial Board of Health in Honolulu record the death of one Tom Shee, age 38 years, on June 19, 1899, at Beretania and Smith Street, whose remains were disinterred on March 30, 1917. (R. p. 33.) The Board accepted in good faith the Appellant's then representations as to his maternity, and relied on this record as being the record

of Appellant's mother, basing its reliance on the Appellant's testimony. If the Appellant's mother died in Hawaii before he was two years old it would follow that the case for Appellant's native birth would be persuasively established.

WITHOUT THE ELEMENT OF CORROBORATION AFFORDED BY THE DEATH RECORD OF TOM SHEE, APPELLANT'S PROOF BEFORE THE BOARD IN 1923 WAS INADEQUATE.

The testimony of Appellant's original witnesses, two of whom claimed knowledge of an infant Lau Hu Yuen in Honolulu before 1899, indicates no subsequent contact with the Appellant whatsoever, although the applicant claimed he had seen them in China in 1922 and 1921, respectively. (R. p. 22.) This identification of an adult as an infant known 22 years before has necessarily been held by this Court to be of no probative value. (*Hung You Hong v. U. S.*, 68 F. (2d) 67 (1933).) Further, the identification by these witnesses of the Appellant on April 28, 1923, is proved to be valueless as each, on February 23, 1923, at Honolulu, had executed an affidavit to which was attached a recent photograph of the Appellant that had been sent from China for that purpose (R. pp. 28, 29) and Appellant presented this affidavit on arrival in Hawaii in 1923. The third witness in 1923, Wong Pan Hin, was four years younger than the Appellant, and had lived in China until 1920; his information concerning Appellant's birth was purely hearsay. (R. p. 31.)

The Board's finding in 1923 recites: "The Doric departed November 24, 1899, but there are no names

on the list". (R. p. 33.) Although the Appellant offered proof at trial that the departure manifest of the "Doric" for November 24, 1899, contains an entry for "Ah Chu" and "child" (R. p. 127), this entry was not considered by the Board in 1923, nor is there any showing by which this fragmentary and apparently incomplete entry may be identified with the Appellant at this time.

Since the ship's manifest in question is filed in the Public Archives of the Territory, it is open to public access. Therefore, this departure entry cannot of itself, without other corroboration, afford a basis for a conclusion that Appellant is the "child" named therein, or that the "Ah Chu" named is Appellant's father. Such was the decision of this Court in *Leong Kim Wai v. Burnett,* 23 F. (2d) 789 (1928).

THE CRUX OF APPELLANT'S CASE IS THE CLAIM OF HIS MOTHER'S DEATH IN HAWAII BEFORE HIS SECOND YEAR.

This review of the Board record in 1923 establishes, it is submitted, that the Appellant's claim of relationship as the son of Tom Shee, of whose death in the Territory in 1899 there is a Board of Health record, constituted the principal corroboration, and the only documentary evidence, of the Appellant's claim of Hawaiian birth. The Government, therefore, did not "build up a straw man to knock it down". (Brief, p. 9.)

THE TRIAL RECORD IN 1935.

APPELLANT'S TESTIMONY SINCE ADMISSION CONCERNING HIS ALLEGED MOTHER'S DEATH, BURIAL AND DISINTERMENT IS IN AGREEMENT WITH, AND SHOWS ADOPTION OF, THE BOARD OF HEALTH RECORD WHICH IS REVEALED TO HAVE BEEN MISTAKENLY RELIED ON BY THE BOARD.

The further developments in this case seem to leave no escape from the conclusion that the Appellant in 1923, and to date, has claimed to be the son of that certain and definite Tom Shee above referred to, and none other. When the Appellant testified in Court regarding his mother, he attributed all his information to his father (R. p. 128) who he then claimed had died in China in 1924 (ibid). However, in his testimony before immigration officers on November 1 and November 27, 1934, as an applicant for a travel document, which testimony he restated in Court, a progressive improvement in Appellant's recollection of additional details occurs—*and each of these details accords with the recitals of record in the files of the Board of Health.* Since the Appellant denied that he had ever referred to any records to refresh his recollection of what his father allegedly stated (R. p. 137), the source of this improvement is conjectural. Since the events occurred before his third year, it can hardly be attributed to the natural functioning of recollection.

Thus, on November 1, 1934, to the statements of fact regarding his alleged mother made in 1923, he added these details: *that death occurred at Beretania Street near Nuuanu, and her burial was at the Manoa Chinese Cemetery.* (R. p. 102.) On November 27, 1934 (R. p. 102), he added three more details: *that*

the cause of death was tuberculosis, and that the remains were disinterred on March 30, 1917, attended to by a local Chinese society, the Lung Doo Ching Sin Tong. Regarding the last date, the Appellant testified in Court on cross-examination that such was the date of *arrival* of his mother's remains in China (R. p. 134), and also alleged that disinterment might have been made by the Chung Sing Tong. (R. p. 132.) Otherwise, he restated the above details in his testimony in Court. (R. pp. 127-138.)

The record of the Bureau of Vital Statistics pertaining to the Tom Shee in question stated that she was disinterred in 1917. The Appellant fell into this trap and claimed that his mother was *disinterred* and *shipped to China* in 1917. (Tr. pp. 139, 102.) The public records did not show that the true son of Tom Shee, after having disinterred his mother in 1917, kept her remains in a small house in the cemetery and did not ship them to China until 1920, as George H. Leong, a son of that decedent, testified (post), and the Appellant had no way of obtaining this knowledge.

THE BOARD OF HEALTH DEATH RECORD OF THE TOM SHEE CLAIMED BY THE APPELLANT AS HIS MOTHER AND RELIED ON BY THE BOARD IN 1923 RELATED TO MRS. LEONG TOM SHEE, AND NOT THE APPELLANT'S MOTHER.

The records of the Territorial Board of Health, produced by the official custodian, Mary H. Lemon, show an entry regarding one Tam See, a Chinese female, aged 38 years, who died of consumption on June 19, 1899, at Honolulu, Beretania near Nuuanu Street,

buried at Manoa Cemetery (R. p. 88) for whose remains disinterment permit No. 572 was issued on March 30, 1917. (R. p. 90.) This record, of course, is open to the public, and in no way secret or confidential. However, it appeared that the disinterment permit had been issued to one George H. Leong, a son of the decedent, and not to the Appellant or the Chung Sing Tong Society.

TESTIMONY OF GEORGE H. LEONG.

George H. Leong testified (R. pp. 81-86) that he was born on September 11, 1890, in Honolulu, T. H., that Tom Shee, who was also known as Leong Tom Shee, was his mother, and Leong Din Moon was his father; that he was the eldest of a family of four which consisted of two boys and two girls, of whom the two sisters survive, one resident in Canton, China, and the other, Mrs. Jessie Leong Hou, a resident of Honolulu. He recalled that his mother died when he was nine years of age at the family home, then located near the Children's Playground at Beretania and Smith Street, bounded by Nuuanu Street. He stated that she died of a lingering sickness, with a crisis brought on by eating an orange. He recalled with particularity the incidents of her death and burial in Manoa Cemetery. He produced the original disinterment permit (U. S. Exhibit No. 4, R. pp. 40, 84), upon the stub of which, in the Board of Health Office, was written his name. (R. p. 90.) He also recalled the death of his infant brother, Leong Tai Hin, at the age

of about two years, at Kalihi Camp, where the family had taken refuge during the great fire of 1900. He associated the date of his mother's death as occurring some six months before that event. He did not know the Appellant, and denied that he was in any way related to him, or that his mother Tom Shee had any other children than those named by him. He stated that although he received the disinternment permit in 1917, the remains of his mother were not taken to China until 1920, being stored in a house in the cemetery in the interim. (R. p. 84.) He stated that his father had returned to China in 1922, and that his death occurred there in 1926.

TESTIMONY OF JESSIE LEONG HOU.

Mrs. Jessie Leong Hou, the sister of George H. Leong, testified to the same parentage and the same family members. (R. pp. 91-93.) She was born in 1895, and had no independent recollection of the death of her mother in 1899, but corroborated the previous testimony of her brother as a matter of family knowledge. She also was positive in disavowing the Appellant as a member of her family, and in denying the possibility of any other children of her mother, Tom Shee, than herself and sister in Canton and her brother George and the deceased brother, Tai Hin. She also testified that the Chinese characters for "Tom Shee" may be read as "Tam See". This seems not to be disputed.

APPELLEE'S WITNESSES WERE CORROBORATED BY THE RECORDS OF THE MANOA CHINESE CEMETERY.

It will be noted that thus far the documentary proof of the identity of the decedent Tom Shee shown in the Board of Health records is incomplete with reference to the name of her husband, and the place of her birth or home village in China. This omission was supplied by the testimony of George H. Leong and Jessie Leong Hou (supra) and by a stub of the original burial permit issued by the Manoa Chinese Cemetery at the time of interment, *found in the first of a series of such stub books* running from 1893 to 1928. (R. pp. 110, 111.) The entire intact series of stub books covering that period was before the Court. The entries on the stub admitted in evidence related to the burial in grave No. 58, of one Tom Shee, wife of Din Moon, who died on June 19, 1899, whose native village was Lung Yit Tow. (U. S. Exhibit No. 5, R. pp. 126, 41.)

THE APPELLANT CORRECTLY STATED ONLY THOSE DETAILS WITH REFERENCE TO TOM SHEE WHICH WERE A MATTER OF PUBLIC RECORD.

From the foregoing it appears that the Appellant in 1923, and with progressive improvement regarding details, in 1934, stated correctly the details regarding his alleged mother, Tom Shee, which were of public record in the office of the Board of Health. But as to other facts not there of record regarding that decedent, he is in error. Tom Shee's husband was not Lau Ah Chew or Chu, the Appellant's alleged father,

but was Leong Din Moon. She did not have but one child, the Appellant, as he testified, but had four children, two of whom were Government witnesses. She was not from Appellant's parents' village of Lung Tow Wan, but from Lung Yit Tow. Her remains had been disinterred, not by a local Chinese society as Appellant claims, but by her eldest son, George H. Leong, and the transfer of the remains was made, not in 1917, as the record of the Board of Health indicated, but in 1920.

THE APPELLANT AT TRIAL DID NOT CLAIM ANY TOM SHEE AS HIS MOTHER OTHER THAN THE DECEDENT WHO WAS THE SUBJECT OF THE BOARD OF HEALTH RECORD. HE CANNOT NOW PRESENT A DEFENSE OTHER THAN THERE ADVANCED.

Assuming the honesty of this Appellant in stating that his father gave him the information detailed by the Appellant, only one explanation is possible, namely, that there occurred the death of another Tom Shee, who was this Appellant's mother, on the same date, at the same locality, of the same ailment, buried in the same cemetery, and disinterred on the same date eighteen years later, *but of whom there is no record, and concerning whose existence and death no living person can be called to testify.* This contention seems to be hinted at as the theory of Appellant's case on appeal. *It still overlooks the fact that even this assumption fails to relieve the original Board action of the error and the improvidence of having based its decision on an inapplicable record.*

That is, stating this assumption in another way, the certificate of identity issued the Appellant on May 29, 1923, was issued to him based on the evidence of (1) his claim of Hawaiian birth as the son of Tom Shee (Tom See) born in Honolulu at Beretania near Nuuanu Street as supported by the (2) records of the Board of Health which support Appellant's contention as to the name of the alleged mother, the place and date of her death, her place of burial and the date of her disinterment. It is beside the question here, whether the Appellant made the representations to the Board of Special Inquiry honestly believing them to be true or whether he did so knowing that his claim was absolutely fraudulent. The important and vital issue is—Did the Board of Special Inquiry issue this certificate upon facts that they then believed to be true but which now turn out to be false in fact? The certificate so issued by the Board of Special Inquiry through such error and improvidence is a fraud upon the Government and its efficacy has been nullified. The Appellant making no other claim of American birth or parentage, there is no basis, in law or in fact, to predicate a right for him to be or remain in the United States.

It developed from the evidence that the Board of Health records for several years prior and subsequent to 1899 were complete (R. p. 91) and showed the death of only one other "Tam See" or "Tom Shee" and that was a "Tam Shee" who died in June, 1898, at a different time, at a different locality, of a different ailment, and was buried in a different cemetery, and disinterred at a different time than Appellant claimed

regarding his mother. (R. p. 90.) The Appellant did not attempt to prove the existence of any other record of the death of a Tom Shee, nor did he, with the Manoa Chinese Cemetery records available, attempt to show a record of burial there of his true mother, or of any other Tom Shee.

THE ERRORS ASSIGNED BY APPELLANT.

The Second, Seventh, Eighth and Ninth Assignments of Error (Brief, pp. 6, 7) (the First, Sixth and Tenth are not argued in the Brief), in effect present a single question, namely: Did the evidence of Appellee overcome the presumption arising from Appellant's prior admission and the issuance to him of a certificate of identity which created for him a prima facie case of his right to be in the United States?

It is submitted that the foregoing facts clearly establish that Appellant obtained admission into the United States in 1923 by fraudulent representations of citizenship. (*Young Mew Song v. U. S.* (1929), 36 F. (2d) 563.)

It is well settled that the unqualified affirmation of a fact not known to be true may constitute fraud.

> *Lynch v. Mercantile Trust Co.,* 18 F. 486;
> *W. P. Walker & Co. v. Walbridge,* 136 F. 19, 23, 26 C. J. 1109, Sec. 39.

Furthermore, a fraudulent intent may be presumed from the above circumstances. In *Ex parte Wong Yee Toon,* 227 Fed. 247, 252, the Court said:

"The petitioner says, however, that the charge in this case is that he secured his admission by fraud and that upon that issue the government must sustain the burden of proof. Be it so. Nevertheless if petitioner is not the son of the Oakland merchant the charge is true."

FRAUD IS NOT THE SOLE GROUND OF IMPEACHMENT OF THE PRIOR FAVORABLE ADMINISTRATIVE DECISION.

Appellant's contention is that the prima facie case for him can be overcome only by proof of fraud that is "clear, cogent, and convincing". The authorities cited for this language (Brief p. 16) are not deportation cases. It is submitted that this view is unsupportable as applied to the case at bar.

The Supreme Court has stated with reference to the effect of a certificate of identity in a deportation proceeding (*Lui Hop Fong v. U. S.* (1908), 209 U.S. 453), that there should be first "some competent evidence to overcome the legal effect of the certificate". That view was followed by this Court in 1917 in *Lui Hip Chin v. Plummer,* 238 F. 763. This Court indicated that the evidence should show that "the certificate had been fraudulently or *irregularly* procured" (*Lum Man Sing v. U. S.* (1928), 29 F. (2d) 500, 501), and concluded (502) that "a record containing any substantial evidence tending to impeach its correctness, or to show that the holder's status is other than what is certified, would be sufficient to warrant deportation". It will be observed that the disjunctive

is used. In *Leong Kwai Yin v. U. S.*, 31 F. (2d) 738, 739, this Court said:

> "In *Lum Man Sing v. U. S.*, 29 F. (2d) 500, this Court held that a certificate of identity issued to a Chinese person * * * is prima facie evidence of the right of the holder of the certificate to be and remain in the United States until overcome by proof tending to show that the certificate was issued improvidently, or was fraudulently obtained. * * * The decision of the Board of Special Inquiry admitting the appellant and his certificate of identity are in no wise impeached for either fraud or error."

And again it should be noted there the disjunctive is used.

The statute provides (supra) that persons of the Chinese race, when defendants in deportation proceedings, shall have the burden of affirmatively establishing their right to be in the United States (supra). This statutory requirement, it is submitted, would be nullified by requiring that the Government, in order to meet its initial burden of attack when a certificate of identity has been issued, or where there has been a prior admission as a citizen, must prove fraud. That the Government need not prove fraud is further supported by the cases of *Leong Kim Wai v. Burnett* (1918), 23 F. (2d) 789; *Tom Ung Chai v. Burnett* (1928), 25 F. (2d) 574; and *Lee Sai Ying v. U. S.* (1928), 29 F. (2d) 108. In *Dong Ling v. U. S.* (1929), 30 F. (2d) 65, the proof established that a departure record for "Ah Kona and boy" had been mistakenly

applied to the defendant by the admitting Board. This was held to justify deportation.

The foregoing cases in which deportation was ordered by this Court, and the instant case, are to be distinguished from the decisions cited by appellant in which deportation orders were reversed because *no* evidence was presented by the Appellee to impeach the original Board action, as in *Lum Man Shing v. U. S.* (1928), 29 F. (2d) 500, and *Choy Yuen Chan v. U. S.* (1929), 30 F. (2d) 516.

Also, the instant case is not within the rule enforced in *Fong Lum Kwai v. U. S.* (1931), 49 F. (2d) 19, and in *Lee Choy v. U. S.* (1931), 49 F. (2d) 24, which cases held that the mere proof that numerous other claimants claimed the same departure or death record, without evidence as to the true identity of the person so named in such record, is insufficient to overcome the prima facie case arising from the prior admission of the defendant as a citizen. In the case at bar the Government has put forward affirmative evidence of the actual identity of the person named in the vital statistics record upon which the Board relied, and which the appellant claimed.

THE GOVERNMENT IS NOT REQUIRED TO CALL THE APPELLANT OR APPELLANT'S WITNESSES AS ITS WITNESSES FOR THE PURPOSE OF IMPEACHING THEM OR DEVELOPING DISCREPANCIES.

It is urged by Appellant that the Appellee must not only prove fraud, but must also prove that Appel-

lant's witnesses were perjurers. This, it is submitted, is not the law. The authorities discussed, supra, hold that if the original administrative action is impeached for either fraud or error, that is sufficient to put the defendant to his statutory burden of proof. The *initial burden of attack* on the certificate which the Government must meet cannot be converted into a *burden of proof* on the Government in disregard of statute.

The Appellant, it is submitted, errs in contending that the Government was required to call Appellee's original witnesses in the Board proceeding to testify at the trial. Any evidence so adduced would have been incompetent to overcome the prima facie case for Appellant. It was held in *Fong Lum Kwai v. U. S.*, 49 F. (2d) 19, 23, that "the mere development of discrepancies on the part of the witnesses summoned by the Government is insufficient to overcome the prima facie presumption which arises from the finding of the Board of Special Inquiry".

It is submitted further than the trial Court was correct in holding that since it had been established that two of the original 1923 witnesses were now available (R. pp. 136, 78), an inference must be drawn against the Appellant for his failure to summon them at the trial. (Decision, R. pp. 52, 53.)

Hung You Hong v. U. S., 68 F. (2d) 67, 69 (C.C.A. 9) (1933). This is conduct which forms a basis for inference and in a deportation case is evidence. *Bilokumsky v. Tod,* 263 U.S. 149, 153.

THE THIRD ASSIGNMENT OF ERROR RELATIVE TO ADMISSION OF THE DISINTERNMENT PERMIT. (U. S. EXHIBIT NO. 4.)

No argument on this alleged error appears in Appellant's brief. Reference to the record discloses that Appellant failed to object or except to the ruling of the Court admitting Appellee's Exhibit No. 4 in evidence. Therefore, the question of the admissibility of this exhibit cannot now be considered on appeal. The authorities hold that if evidence is received without objection, alleged error based on its reception will not be reviewed by the Appellate Court.

Boland v. Great Northern Ry. Co., 202 F. 485 (C.C.A. 9);
Cornett v. U. S., 7 F. (2d) 531.

THE FOURTH ASSIGNMENT OF ERROR RELATIVE TO ADMISSION OF THE MANOA CHINESE CEMETERY RECORD.

This stub book was admitted in evidence as U. S. Exhibit No. 5. To quote the Court's reason for overruling the Appellant's objection to the admissibility of this record into evidence (R. p. 124):

> "On the face of the instrument it shows that it is 35 years old. It was brought in from the hands of the custodian; it has been shown to have been in the hands of the Treasurer for some time, until the copies were made, rendering the necessity for the keeping that record by that particular official no longer necessary; the copies were not admitted in evidence; the book itself has the appearance of age; the books with which it was con-

> nected had the appearance of age, though not as great as the one in question; from the Court's examination of this particular book it was shown that there are purported interments in the Manoa Chinese Cemetery running from 1894 to 1904, if I remember rightly, or 1906."

It appeared further than the parties who made the record were deceased and that the record was a business record. (R. pp. 109-117.)

This cemetery burial record was established as relating to the same Tom Shee covered by the Board of Health record, both by the recitals contained in the burial record and by the testimony of George H. Leong. It was admissible, therefore, to prove the family name of such Tom Shee, and to further identify the person named in the Board of Health record.

That a document of this nature is admissible in evidence as an ancient document without further proof of its authenticity is clear under the authorities.

> *Barr v. Gratz's Heirs,* 4 Wheat. (U.S.) 213, 217;
> *Johnson v. Jarvis,* 223 F. 756, 758;
> *McGuire v. Blount,* 199 U.S. 142;
> *Fulkerson v. Holmes,* 117 U.S. 389;
> *Burns v. U. S.,* 160 F. 631;
> *William v. Conger,* 125 U.S. 397.

Appellant argues (Appellant's Brief p. 11) that the recitals contained in U. S. Exhibit No. 5 are hearsay, and that on that ground this Exhibit was erroneously admitted in evidence. The record discloses that when

U. S. Exhibit No. 5 was offered in evidence, counsel for Appellant objected to the offer on a number of grounds (R. p. 124), but failed to object on the ground that it is hearsay. It is well settled that when evidence is inadmissible but its introduction is objected to on grounds that do not apply and the objection is overruled, the Appellate Court will not consider such an alleged error. *Proffitt v. U. S.*, 264 F. 299 (C.C.A. 9); *Prudential Insurance Company of America v. Faulkner*, 68 F. (2d) 676.

Assuming that Appellant's hearsay objection to the Manoa Cemetery Record may be considered on this appeal, it is submitted, nevertheless, that this objection is not supportable under the authorities cited, supra. That this cemetery record is further admissible as a business record of original entry is also clear under the authorities.

In *Lewis v. Marshall*, 5 Pet. (U.S.) 469, 475, an extract from a registered book of burials in Christ's Church was held properly admitted in evidence.

See, also:

Hitchner Wall Paper Co. v. Penn. Ry. Co., 158 Fed. 1011, 1014;

E. I. Dupont DeNemours & Co. v. Tomlinson, 296 Fed. 635;

Central Commercial Co. v. Jones Dusenberg Co., 215 Fed. 213.

The record discloses that the information contained in the recital in the Manoa Cemetery record (U. S.

Exhibit No. 5) was furnished by relations of the decedent. (R. p. 110.)

It is submitted, therefore, that these recitals being matters of pedigree are admissible under the pedigree exception to the hearsay rule, as well as under the exceptions previously discussed.

> *Fulkerson v. Holmes,* 117 U.S. 389, at 397, 398;
> 3 *Jones Commentaries on Evidence* (2d. Ed.), 2108, Sec. 1147;
> *Stein v. Bowman,* 13 Pet. (U.S.) 209, 219;
> *Gaines v. New Orleans,* 6 Wall. (U.S.) 642, 699.

On principle there is little to distinguish an entry in a cemetery record from an entry in a family Bible or inscription on a monument. The authorities hold that entries in a family Bible are admissible in evidence under the pedigree exception to the hearsay rule. *Lewis v. Marshall,* supra, and the same is held as to inscriptions on monuments.

> *M'Claskey v. Barr,* 54 Fed. 781, 784.

It is submitted that it does not avail appellant to argue the incompleteness of these death and departure records. (Brief p. 17.) A single death record is here at issue which record was entered in the Board of Health Records. Furthermore, there is no evidence in this record on appeal regarding the alleged deficiencies of local death records. The opposite is true. On cross-examination, the Registrar General of the Board of Health "was asked if she knew whether or not the record of deaths occurring in Honolulu in the years 1898-1899-1900 were complete and she said yes." (R. p. 91.)

The controversial statement from an 1899 report of the President of the Board of Health (Brief p. 17), is not material, nor has it been admitted in evidence in this case. The same is true of the 1902 Board of Health report (Brief p. 19) relating to disinterments.

CONCLUSION.

It is submitted as to the law:

(1) That issuance of a Certificate of Identity or admission into the United States as a citizen does not give rise to a prima facie case which can be overcome only by proof of conscious, active, and actionable fraud by the Chinese. It merely imposes upon the Government an initial burden of attack which is met by showing fraud, legal, imputed, or constructive—*error,* or improvidence, in that admission, or issuance of the Certificate.

(2) That when the original admission is so impeached, it next devolves upon the Appellant to meet the burden imposed by the Chinese Exclusion Acts, Section 3, Act of May 3, 1892, 8 U.S.C.A. 284. "A prima facie case must be made by the Government in the first instance, but the burden of proof to show a right to remain is upon the defendant". Judge Neterer in *U. S. v. Chin Nun Gee* (1930), 45 F. (2d) 225, 226.

It is submitted, secondly, upon the facts:

(1) That the evidence established a false claim of maternity by this Appellant at the time of his admis-

sion; that it is shown that Appellant, by his evidence, misled the admitting Board, causing it to rely on an official record that did not pertain to this Appellant's mother; that this error and fraud related to a vital and material point in Appellant's original proof of his claim of citizenship.

(2) That, therefore, the prima facie case for Appellant arising from his prior admission as a citizen was overcome.

(3) That Appellant failed to sustain the statutory burden of proving his claim of Hawaiian birth; that he offered no affirmative proof for the assistance of the Court other than to repeat his ill-founded erroneous claim of maternity.

This Court has recently emphasized the requirement of the law which this Appellant has failed to meet. (*Hung You Hong v. U. S.* (1933), 68 F. (2d) 67.)

The decision appealed from should be affirmed.

Dated, Honolulu, T. H., this 30th day of April, 1936.

Respectfully submitted,

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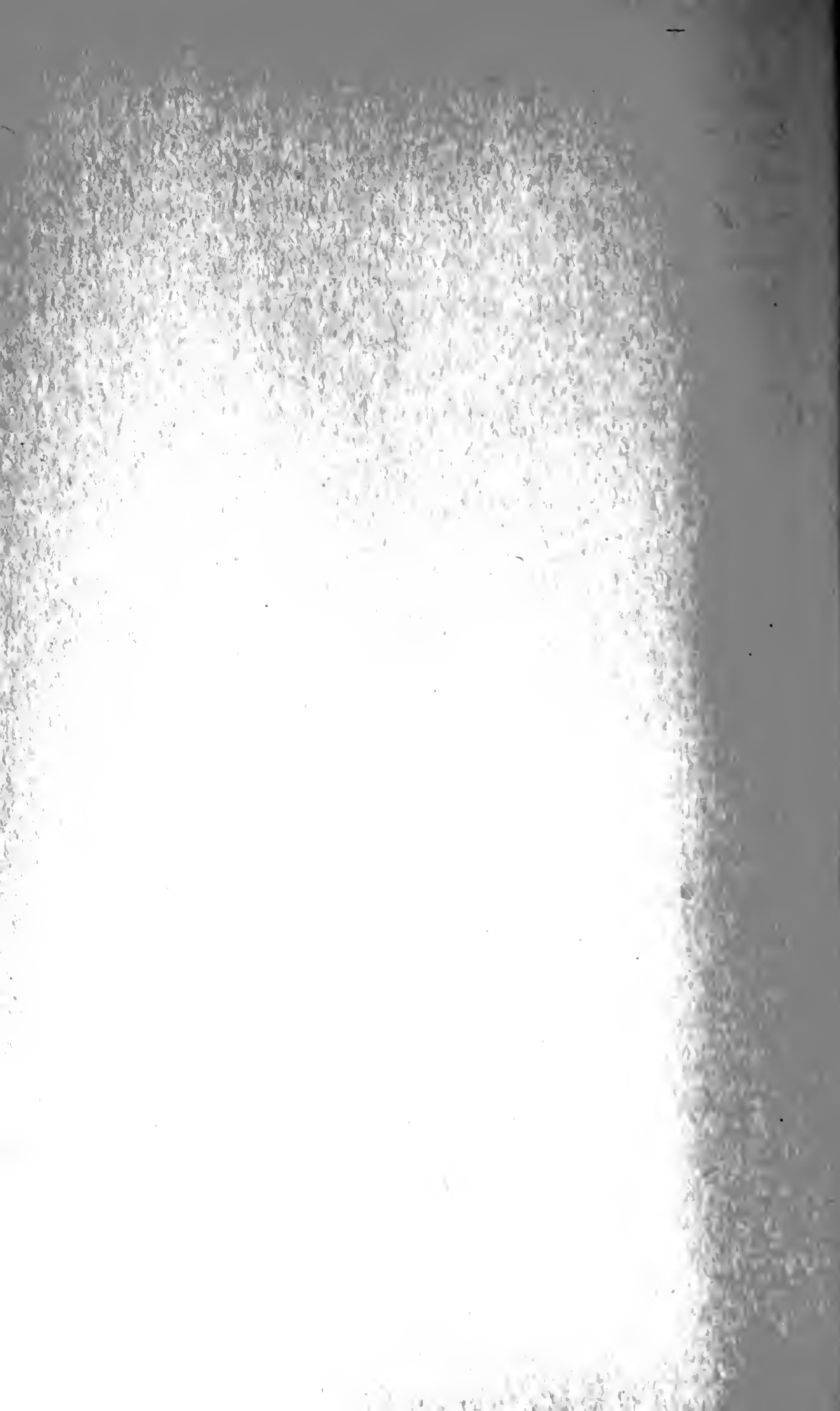

No. 8116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAU HU YUEN, alias LAU CHOCK WAH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

INGRAM M. STAINBACK,
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PAUL P. O'BRIEN,
CLERK

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No. 8116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Lau Hu Yuen, alias Lau Chock Wah,
Appellant,

vs.

United States of America,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the United States of America, Appellee in the above entitled cause, by its attorneys, and respectfully petitions this Honorable Court to rehear said cause; and as grounds believed by it to warrant a rehearing directs the Court's attention to the following matters of law and fact which the Court is deemed to have inadvertently overlooked.

I.

The Court mistakenly (Decision, par. 11) assumed that the two (2) witnesses who testified before the

Board of Special Inquiry on the Appellant's behalf in 1923, had, in November 1934,—when questioned by an Immigration Inspector—admitted error in asserting in 1923 Lau Hu Yuen's Hawaiian birth. (R. 78.) The record does not warrant that inference, and being contrary to the fact, these two (2) individuals were not in 1935 available as witnesses for the Government. Had they been made Government witnesses, the Government would have been precluded from attempting to impeach their veracity by inconsistent statements, except on the ground of surprise, in which event the impeachment could have no effect other than to offset their testimony at the trial itself. (*Sullivan v. U. S.* (C. C. A. 9), 28 F. (2d) 147.) These two (2) individuals were in 1935 the Appellant's witnesses and he failed to call them to his aid, though, as the Court correctly points out (Decision, par. 12), their recorded 1923 testimony was "inferior evidence to what they might have testified in the trial in 1935."

> *Fong Lum Kwai vs. U. S.*, 49 F. (2d) 19, 23 (1931);
>
> *Hung You Hong vs. U. S.*, 68 F. (2d) 67, 69 (1933).

II.

The Court mistakenly (Decision, par. 18) assumed that it was incumbent upon the Government to prove that the Tam Shee who died on June 13, *1898*, was not the Appellant's mother.

The record shows (R. 136) that the Appellant and his two (2) 1923 witnesses (R. 25, 27) exclusively

claimed the Tam Shee who died on June 19, *1899,* to have been his mother, and the Court grants that the Government proved that that person was not Appellant's mother.

Further, in this same connection, the Record shows (R. 90) that the Tam Shee who died on June 13, 1898 of *"fever"* was then thirty-one years of age, and was buried in Pauoa Cemetery, whereas Lau Hu Yuen testified (R. 134-137) and the Record shows (R. 88, 90) that the Tam Shee who Lau Hu Yuen claimed was his mother and who died on June 19, 1899, was thirty-eight (38) years of age at her death; that she died of tuberculosis; and that she was buried in Manoa Cemetery.

In connection with the identity of Lau Hu Yuen's mother, the Court's attention is further directed to the fact that his two (2) witnesses before the Board of Special Inquiry stated that the Tam Shee who was Lau Hu Yuen's mother died "K S -25, the 5th month" (R. 25, 27), said Chinese date corresponding to *June 19, 1899.*

From Lau Hu Yuen's testimony that his mother's remains arrived in China March 30, 1917 (R. 134)—the precise date upon which Disinterment Permit No. 572 was issued in Honolulu for the remains of the Tam Shee who died June 19, 1899 (R. 89, 90)—the Court mistakenly assumed (Decision, par. 22, 23, 26) it to have been incumbent upon the Government to prove that such remains were not those of the Tam Shee who died in Honolulu June 13, 1898. The Court inadvertently overlooked the fact that nowhere does

the Record disclose that Lau Hu Yuen, or anyone in his behalf, claimed that the Tam Shee who died June 13, 1898 was his mother; but on the contrary, the Record shows (R. 25, 27, 128, 137) a consistent claim by and on behalf of Lau Hu Yuen that the Tam Shee who died June 19, 1899, was his mother.

III.

The Court inadvertently (Decision, par. 20) considered immaterial Lau Hu Yuen's own testimony before the Board of Special Inquiry as to the identity of his mother. Not only is this kind of pedigree hearsay accepted by Courts as having probative value, but also as Boards of Special Inquiry are not curtailed by the strict rules of evidence the Court erred in deeming the Board of Special Inquiry to have attached no weight to Lau Hu Yuen's testimony that his mother was the Tam Shee who died June 19, 1899 of tuberculosis and who was buried in Manoa Cemetery. The Court's attention is invited to the especial value of pedigree testimony which emanates from a person who has the greatest interest in the world to be correctly informed as to his mother and who is a member of a race of people who revere and worship their ancestors.

> *U. S. v. Wong Gong*, 70 F. (2d) 107 (1934);
>
> *Mui Sam Hun v. U. S.*, 78 F. (2d) 612, 616 (1935);
>
> *Yep Suey Ning v. Berkshire*, 73 F. (2d) 745, 747 (1934).

IV.

The Court states (Decision, par. 3) that "Appellant had two sons and the uncontradicted evidence later adduced at the trial showed the two sons still living." Again in paragraphs 6, 12, 15, the Court mentions "two sons." All that the Record shows (R. 20, 21) is that in 1923 Lau Hu Yuen stated that he had two sons in China. In the 1935 trial no other evidence pertained to the two sons, and neither the Board of Special Inquiry's nor the District Court's decision touched upon the Appellant having two sons. The Record does not indicate the continued existence of these two sons nor their claim to United States citizenship through Lau Hu Yuen.

V.

The Court overlooked its previous Decisions to the effect that when the Government has discharged its burden of going forward with the evidence to rebut the Defendant-Appellant's prima facie case, the Defendant-Appellant must meet and discharge the statutory burden defined by Section 3 of the Act of May 5, 1892 (8 U. S. C. A. 284) and it is submitted that not only did the Government's evidence of "fraud," "irregularity" and "improvidence" rebut the prima facie correctness of the Board of Special Inquiry's determination, and that the weight of this rebutting evidence is not open to review by the Appellate Court, but that the Defendant-Appellant thereafter failed to discharge his burden of affirmatively proving to

the satisfaction of the Court his lawful right to remain in the United States.

Lum Man Sing v. U. S., (1928) 29 F. (2d) 500, 501, 502;

Dong Ling v. U. S., 30 F. (2d) 65, 66 (1929);

Leong Kwai Yin v. U. S., 31 F. (2d) 738, 739 (1929);

U. S. v. Chin Nun Gee, 45 F. (2d) 225, 226 (1930).

See also other cases cited in Appellee's Brief pp. 18-20.

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the Judgment of the United States District Court for the Territory of Hawaii, upon further consideration, be affirmed.

Dated, Honolulu, T. H., this 3rd day of September, A. D. 1936.

UNITED STATES OF AMERICA,
Appellee,

By INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii,

J. FRANK MCLAUGHLIN,
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Attorneys for Appellee and Petitioner.

Certificate of Counsel

I, Ingram M. Stainback, United States Attorney for the District of Hawaii, of counsel for the United States of America in the above named cause, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

Ingram M. Stainback,
United States Attorney,
District of Hawaii,
Attorney for Appellee and Petitioner.

Due service and receipt of a copy of the foregoing Petition for Rehearing is hereby admitted this 4th day of September, A. D. 1936.

E. J. Botts,
Attorney for Appellant.

No. 8117

United States
Circuit Court of Appeals

For the Ninth Circuit.

FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association, FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation, and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation, and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation and C. W. DEAL,
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Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

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PAUL P. O'BRIEN,

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8117

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In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 1955-S—In Equity.

IN THE MATTER OF AN AWARD FILED HEREIN OCTOBER 31, 1927, pursuant to an arbitration held UNDER THE ACT OF CONGRESS known as the RAILWAY LABOR ACT, between The Atchison Topeka and Santa Fe Railway Company, Northwestern Pacific Railroad Company, Southern Pacific Company, and The Western Pacific Railroad Company, as parties of the first part and certain employees thereof, represented by the Ferryboatmen's Union of California, as the party of the second part.

FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association and C. W. DEAL (as the business manager and executive officer of said Union) suing on behalf of himself and the other members of said Union and all persons interested in the subject matter of this bill in equity, Plaintiffs,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY, corporations, Defendants. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

[In action 1955-S the plaintiffs filed an "Ancillary Bill to enforce Decree already rendered herein". The allegations therein contained are substantially the same as the bill against the Southern Pacific Company which is printed later herein, being action #3635-S. For reasons of economy and in order to avoid unnecessary duplication this bill is not printed here.

The Southern Pacific Company and the Northwestern Pacific Railroad Company filed answers to this bill. The allegations of these answers are substantially the same as the allegations of the Southern Pacific Company in their answer in #3635-S, which is printed later herein. They are not printed here as a matter of economy and in order to avoid unnecessary duplication.]

[Title of Court and Cause—No. 1955-S.]

NOTICE OF MOTION FOR REFERENCE TO COMMISSIONER ETC.

To the Southern Pacific Company, Northwestern Pacific Railroad Company, The Western Pacific Railroad Company and to their respective counsel:

You and each of you will please take notice that on Monday, the 25th day of September, 1933, at the hour of 10 A. M., or as soon thereafter as counsel can be heard, in the court room of the above entitled court, Ferryboatmen's Union of California, an unincorporated association, and Ferryboatmen's Union of California, a corporation, will move the above entitled court for its order referring the above matter to a commissioner to determine how much money is due the members of the Ferryboatmen's Union of California, in accordance with and under the decree heretofore entered herein and that thereafter this Court issue execution or other

process herein to enforce the collection of the amounts so found due and that the court make such other orders as will be necessary or proper to carry into effect the judgment and decree heretofore entered herein. [11]

Said motion will be based on the ground that the decree heretofore entered herein did not fix the amounts due and that the amounts due have not been paid by the carriers as required by said judgment and decree.

Said motion will be based on the further ground that the issuance of said orders will be in the furtherance of justice.

Said motion will be made on all the records, papers and files herein, upon affidavit served herewith, or at or prior to the hearing of the motion herein, and upon such testimony as may be adduced at said hearing.

September 20th, 1933.

DERBY, SHARP, QUINBY & TWEEDT
Solicitors for Ferryboatmen's Union of California (an unincorporated association) and Ferryboatmen's Union of California (a non profit corporation).

[Endorsed]: Receipt of a copy of the within NOTICE OF MOTION FOR REFERENCE TO COMMISSIONER ETC., is hereby acknowledged this 20th day of September 1933.

H. C. BOOTH
A. A. JONES
Solicitors for Southern Pacific Co. and Northwestern Pacific Railroad Co.

Filed Sep. 20, 1933. [12]

[Title of Court and Cause—No. 1955-S.]

AFFIDAVIT OF C. W. DEAL.

State of California
City and County of San Francisco—ss.

C. W. DEAL, being first duly sworn, deposes and states as follows: he is the secretary and an executive officer of Ferryboatmen's Union of California above named and is personally familiar with the facts set out in this affidavit.

In the judgment heretofore entered herein, the Court ordered the above named carriers to observe the following rules as and from March 1, 1928:

> "Rule 6. Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days."
>
> "Rule 8. The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate". [13]

Said judgment also provided that

> "the above named carriers and each of them shall, * * * put said wages and rules into effect as of the effective dates above mentioned * * * and cause all of said employes to be paid all back pay retroactively or otherwise due to said employees or any of them in accordance with said award and this judgment".

By said award and judgment it was decreed that all men heretofore working on a 12-hour per day basis, work on an 8 hour per day basis, such men being hereinafter referred to as "said former 12-hour men".

Notwithstanding the agreement of the parties and the judgment based upon said award, said carriers continued to employ "said former 12-hourmen" in excess of 8 hours per day, to-wit, on watches averaging 12 hours per day, until on or about September 1, 1928.

During the period from and including March 1, 1928, to September 1, 1928, all of "said former 12-hour men" above mentioned were worked in excess of 8 hours per day as fixed in said award. "Said former 12-hour men" have not been paid the over time due them on account of being worked in excess of the 8 hours per day fixed in said judgment and decree and sums in excess of $40,000.00, plus interest, are now due, owing and unpaid from the carriers above named to "said former 12-hour men".

Demand has been made on said carriers to comply with said judgment and decree, but said carriers and each of them have failed and refused to do so.

Said Union and affiant do not know the exact amount due each man. The exact amount due each man depends on complicated and intricate computations requiring the services of a commissioner or special master. The records and accounts of the

carriers above [14] mentioned contain time cards and other data from which it can be determined the exact number of hours worked by each man during the period in question, the exact hourly rate, the amount of money paid him on the former rates and the amount due him under the award. These records are voluminous and will require considerable checking and computation in order to fix the exact amount due "said former 12-hour men".

C. W. DEAL

Subscribed and sworn to before me this 23rd day of September, 1933.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within Affidavit of C. W. Deal in support of motion for reference to a commissioner is hereby acknowledged this 23 day of September, 1933.

H. C. BOOTH & A. A. JONES

Solicitors for Southern Pacific Company and Northwestern Pacific Railroad Company.

C. W. DOOLING

Solicitors for Western Pacific Railroad Company.

Filed Sep. 25, 1933. [15]

[Title of Court and Cause—No. 1955-S.]

AFFIDAVIT OF C. W. DEAL IN SUPPORT OF MOTION TO REFER TO COMMISSIONER ETC.

State of California
City and County of San Francisco—ss.

C. W. DEAL, being first duly sworn, deposes and states as follows:

I am the secretary, business manager and principal executive officer of Ferryboatmen's Union of California, both of the original unincorporated association and of the association as incorporated under date of October 2, 1931.

I am familiar with all the matters and things involved in the above proceeding and appeared before the Arbitration Board generally, on behalf of the Union, both in the arbitration proceedings and subsequent litgation.

The pending controversy involves two questions: one the amount due the men and the other the refusal of the carriers [16] to pay the men anything at all, claiming that nothing is due.

So far as the correct amount due is concerned, if anything, it will be necessary to check the records of the carriers and make intricate and complicated computations to find out what is due each man concerned, if anything.

No stipulation or agreement has been entered into fixing the amount due, although, in litigation pending in the State courts, a tentative stipulation was discussed, whereby the Union agreed to accept

the figures of the carrier, if certain other matters were in exchange stipulated to. However, said stipulation was never formally entered into and the amounts due have not been agreed to in said suit, or otherwise, or at all.

The question as to whether any amount is due or not, is raised by the refusal of the carriers to observe the plain language of the Arbitration Award. There is nothing uncertain or ambiguous in that Arbitration Award. The Award merely adopted for general use a rule which has been in existence since 1919 and which has been unqualifiedly put in practice, without exception and without there in fact being any understanding as to its meaning or application ever since 1919 to date.

There is no difference between the parties as to the meaning or application of the award, as the award merely adopts language theretofore used by the parties and put into actual effect and operation since 1919 to date without any dispute or misunderstanding.

Before the pending controversy, the men were employed by the carriers under Rule 6. which read as follows:

> "Assigned crews, except as hereinafter provided, will work either on the basis of
>
> (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off,
>
> OR
>
> (b) Eight (8) hours or less on watch each day for six (6) consecutive days. [17]

As will be seen, the rule provided an alternative for 12 and 8 hour watches. The Award did not change the language of the rule, but did delete the portion permitting a 12-hour watch.

Ever since 1919 the 8-hour rule has been construed to mean that for every minute worked in excess of 8 hours, the men were entitled to overtime. In the instant case, the carriers have refused to apply the rule in the same way that they have been doing since 1919.

Under the Arbitration Agreement of the parties, the only question submitted to arbitration was whether or not the 12-hour day should be abolished. The question as to the date the change should take effect was expressly not left to the Arbitration Board, but was fixed by the express agreement of the parties. This agreement provided that the abolishment of the 12-hour day should go into effect on the first of the month following the making of the Award. The Award was made in October, 1927, and the effective date of the abolishment of the 12-hour day was, therefore, November 1, 1927. While the matter was pending on appeal, on May 19, 1928, the parties entered into an agreement advancing the effective date to March 1, 1928, and the judgment which was entered on September 29, 1928, required the carriers to put the rule into effect retroactively as of March 1, 1928, in accordance with the agreement of the parties.

At no time have any of the carriers made application to have any controversy referred back to the

Arbitration Board, and, under the Railway Labor Act, the judgment is now final.

There is no uncertainty in the Award or in the rule in question or any ambiguity in connection therewith and the only controversy arises out of the refusal of the carriers to put the rule into effect, in the instant case, in the same manner as it has been in effect in every other case since 1919.

The controversy arises out of the necessity of carrying out the agreement between the parties for the retroactive [18] application of the Award. No question in relation to this matter was submitted to the Arbitration Board and under the Railway Labor Act, no question can be considered by the Arbitration Board unless the same is specifically agreed to by the parties. In fact the controversy arises out of matters which took place after the Arbitration Award itself was made.

C. W. DEAL

Subscribed and sworn to before me this 24th day of November, 1933.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Copy served on Mr. Booth by me November 27, 1933.

JOSEPH C. SHARP

Filed Nov. 28, 1933. [19]

In the Southern Division of the United States District Court, in and for the Northern District of California Second Division

No. 3635-S

IN EQUITY.

FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association and C. W. DEAL (as the business manager and executive officer of said Union) suing on behalf of himself and all persons interested in the subject matter of this bill in equity,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

BILL IN EQUITY TO ENFORCE DECREE

Come now the plaintiffs above named and for cause of action against defendant allege as follows:

I.

Ferryboatmen's Union of California is a labor union duly existing under and by virtue of the laws of the State of California. On October 2, 1931, said Union was incorporated as a non profit corporation

under the laws of the State of California. At and prior to October 2, 1931, Ferryboatmen's Union of California, an unincorporated association, was a labor union existing at all times mentioned herein under and by virtue of the laws of the State of California.

On October 2, 1931, said unincorporated association transferred and assigned to said corporation all its rights and interest in the decree hereinafter mentioned. However, said [67] unincorporated association still appears as a party in the proceeding in which said decree was obtained and no order substituting said corporation for said unincorporated association has been made.

II.

Defendant, Southern Pacific Company, is and at all times mentioned herein was a corporation duly organized and existing and doing business in the State of California.

III.

At all times mentioned herein said unincorporated association and said incorporated union each consisted of many hundreds of men employed by defendant herein and other carriers operating ferry boats on San Francisco Bay. Up to October 2, 1931, said unincorporated association was and thereafter said incorporated union was and now is the duly designated and acting representative of said employees as defined and provided for in the Rail-

way Labor Act heretofore enacted by the Congress of the United States.

IV.

At all times mentioned herein, defendant was and still is a carrier, as the same is defined in said Railway Labor Act and was and still is an interstate carrier subject to the provisions of said Act. At all of said times the members of said Union, both unincorporated and incorporated, were employees, as the same are defined in said Act.

V.

In the year 1925 said employees, as represented by said Union, agreed in writing with said carrier, as to what [68] wages and working conditions should govern said employees. Said writing provided that crews of said men employed in various positions by said carrier should work in certain positions on the basis of "12 hours on watch, then 24 hours off watch, without pay for time off" and in other positions on the basis of "8 hours or less on watch each day for six consecutive days". The hours so fixed for such positions were and are known as straight time and all time employed each day in excess of such straight time so fixed for such positions is known as overtime, that is to say: at all times herein mentioned, twelve hours constituted straight time on jobs requiring "12 hours on watch", and all time in excess of twelve hours constituted overtime; and eight hours constituted

straight time on jobs requiring "8 hours or less on watch each day", and all time in excess of eight hours each day constituted overtime. Under the agreement made as aforesaid, the wages of said men were fixed at a monthly salary specified in said agreement which monthly salary was agreed to cover straight time only and said agreement provided that each man be paid for all overtime he was worked by the carrier each day in excess of the eight or twelve hours per day straight time fixed for his particular position; and that he should be paid for such overtime in addition to said monthly salary, such overtime to be on an hourly wage basis ascertained by pro rating the regular monthly salary by the number of hours straight time fixed for his position in said agreement.

VI.

In the year 1927 a controversy existed between said employees and defendant herein. Thereupon said parties entered into an agreement, as provided by section 7 of said Act, [69] which agreement provided for the settlement of said controversy by arbitration pursuant to the terms of said Railway Labor Act. Under said agreement the parties submitted to arbitration whether or not there should be an increase in the wages to be paid by the carriers to the employees and whether or not certain men then working on a 12-hour per day basis should have their hours reduced to an 8-hour per day basis. In

said agreement it was provided that any Award made with respect to hours of labor should become effective as of the first day of the month following the date of the filing of the Award made pursuant to said Agreement.

VII.

In accordance with said agreement, arbitration proceedings were had pursuant to said Railway Labor Act, and in such proceedings an Award was duly made governing the defendant herein and the members of said Union employed by it. Said Arbitration Award was filed in accordance with said agreement on October 31, 1927, and, by the terms of said agreement, said Award became effective as to hours of labor as of November 1, 1927. By the terms of said Award, all twelve hour watches (with some designated exceptions, as appears in the Award hereinafter set out in full), were abolished and it was declared that all men then working in certain positions on a 12-hour per day basis should thereafter work on an 8-hour per day basis, such men being hereinafter referred to as "said former 12-hour men". However, notwithstanding said agreement and Award made pursuant thereto, defendant continued to [70] employ "said former 12-hour men" in excess of eight hours per day, to-wit, on various watches averaging twelve hours per day, until on or about September 1, 1928. The words and figures of said Award are set out in full com-

mencing at line 11 of page two of Exhibit "A" hereinafter mentioned.

VIII.

Said Award was filed in the United States District Court for the Northern District of California, as provided for in said Railway Labor Act. Thereafter, to-wit, on November 9, 1927, said defendant filed in said Federal Court a petition to impeach said Award, which petition was dismissed by said Court by an Order dated February 9, 1928, which Order affirmed said Award. Thereafter, said carrier took an appeal from said Order to the Circuit Court of Appeals for the Ninth Circuit, which Court on August 20, 1928, affirmed said Order of said District Court.

IX.

Pending said appeal, to-wit, on May 19, 1928, the parties entered into an agreement whereunder the parties advanced the effective date of the 8-hour per day basis from said November 1, 1927, to March 1, 1928, and it was agreed that, if the order of said district court was affirmed, that the 8-hour day be put into effect for all of "said former 12-hour men" as of March 1, 1928. In the meanwhile and to and including on or about the 1st day of September, 1928, said carriers continued to employ all "said former 12-hour men" on daily watches averaging twelve hours per day notwithstanding said Award and said Agreement. Said Agreement entered into

on May 19, 1928, was signed by said unincorporated association on the one hand, as representing its members in [71] accordance with said Railway Labor Act, and by defendant herein and other interested carriers on the other hand.

X.

After the said Circuit Court of Appeals affirmed the order of the said District Court, said District Court on September 29, 1928, entered a judgment in accord with the terms of said Act, which judgment is set out in words and figures as Exhibit "A", which Exhibit "A" is annexed hereto and by this reference expressly incorporated as a part of this paragraph as if herein set out in full. Said judgment has not been modified in any way nor appealed from, and now is a final and subsisting judgment between the parties thereto.

XI.

Said judgment provided that the defendant herein and other interested carriers should observe the following rules as and from March 1, 1928:

> "Rule 6. Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days."
>
> "Rule 8. The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the

present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate."

Said judgment also provided that the defendant herein shall

"* * * put said wages and rules into effect as of the effective dates above mentioned * * * and cause all of said employes to be paid all back pay retroactively or otherwise due to said employes or any of them in accordance with said award and this judgment."

Notwithstanding the agreement of the parties and the judgment based on said Award said carrier continued to employ "said former 12-hour men" on daily watches averaging in excess of 8 hours per [72] day, to-wit, on watches averaging 12 hours per day, until on or about September 1, 1928.

XII

During the period from and including March 1, 1928, to September 1, 1928, all of "said former 12-hour men" were employed each day in excess of 8 hours per day as fixed in said Award. The exact number of hours worked each day by each man in excess of 8 hours per day is not known to plaintiffs herein, but the same may be ascertained from the time cards and other records in the possession of defendant herein. The ascertainment of the exact amount due each man depends upon many computations and examinations of records, all of which will

be long and complicated and in regard to which plaintiffs require an accounting to be had by the parties.

The total amount now due, owing and unpaid for said overtime from defendant herein aggregates a sum in excess of Forty Thousand ($40,000) Dollars.

Notwithstanding "said former 12-hour men" have been employed in excess of the fixed hours per day as above alleged herein the over time due said men for the excess hourage has not been paid to said men or any of them, although demand has been made upon defendant for the payment of said overtime as required by said judgment.

XIII

a. The jurisdiction of this court arises out of the fact that this bill is ancillary to and by way of enforcement of a decree already rendered by this Court, and out of the further fact that this Court has inherent power to enforce its own decrees. Said decree was rendered on September 29, 1928, in a [73] proceeding in the equity division of this Court numbered "in Equity No. 1955-S" and entitled

> IN THE MATTER OF AN AWARD FILED HEREIN OCTOBER 31, 1927, pursuant to an arbitration held UNDER THE ACT OF CONGRESS known as the RAILWAY LABOR ACT, between The Atchison Topeka and Santa Fe Railway Company, North western Pacific Railroad Company, Southern

Pacific Company and The Western Pacific Railroad Company, as parties of the first part and certain employees thereof, represented by the Ferryboatmen's Union of California, as the party of the second part.

b. The jurisdiction is also supported by the fact that this is a suit arising out of a law regulating commerce, to-wit, the Railway Labor Act, and is a suit to enforce a judgment rendered pursuant to that Act.

c. In view of the fact that this suit is ancillary to a proceeding already before this Count (and of which the Court had jurisdiction and in which the decree hereinafter referred to was rendered) and in view of the further fact that this suit is one of the cases referred to in the provisions of Section 24 (Subdivision First) of the Judicial Code and Section 24 (Subdivision Eighth) of said Judicial Code, it is not necessary that the sum or value in controversy amount to any particular sum. However, the amount involved in this litigation and the sum in controversy is in excess of $3,000.00. exclusive of interest and costs.

d. Jurisdiction in equity of this suit is hereby asserted on the ground that the suit is ancillary to a proceeding now pending herein in equity, to-wit, the proceeding above referred to and numbered In Equity 1955-S, and that this is a suit to enforce a decree already rendered in equity in said proceeding in equity, and upon the further ground that the equitable remedy of accounting [74] is necessary

to give plaintiffs adequate relief and upon the further ground that plaintiff has no plain, speedy or adequate remedy at law. However, if plaintiffs be in error as to this, plaintiffs ask the Court by appropriate order to transfer this case to the law side of the Court.

e. Plaintiffs offer to do full and complete equity in the premises.

AND FOR A FURTHER SEPARATE AND SECOND CAUSE OF ACTION PLAINTIFFS ALLEGE AS FOLLOWS:

I.

Plaintiffs refer to all the allegations of the First Cause of Action above set forth and by this reference incorporate the same as a part of this Second Cause of Action to all intents and purposes as if set out herein in full.

II.

Prior to the filing of suit herein "said former 12-hour men" individually assigned and transferred to the members of said unincorporated association collectively (including C. W. DEAL, as one of said members) said judgment and all their individual rights, money and back pay due under said judgment. Said members, including said C. W. Deal, and said unincorporated association, prior to the filing of suit herein, transferred and assigned to the incorporated union, plaintiff herein, said judgment and individual rights, money and back pay due

thereunder and said incorporated union is now the owner of and the person entitled to collect all of said wages, moneys, rights and back pay overtime.

The names of the employees whose right, title and interest in and to said moneys and back pay due under said [75] judgment are now in the ownership of plaintiffs and who were employed by defendant Southern Pacific Company at all times herein mentioned, are set out in Exhibit "SP", which exhibit is annexed hereto and by this reference expressly incorporated as a part hereof, as if set out in full.

WHEREFORE, plaintiffs pray for judgment against defendant and relief as follows:

1. That an accounting be had and it be determined exactly how much is due from defendant on account of said overtime and back pay.

2. That the Court issue judgment, decree and execution for the amount found to be due.

3. That the court make such further orders as may be necessary to carry said judgment and award into effect.

4. That the Court make such further orders and decrees as may be meet and proper in the premises.

5. That plaintiffs have their costs of suit as may be meet and proper in the premises.

Dated: September 27, 1933.

DERBY, SHARP, QUINBY & TWEEDT

JOSEPH C. SHARP

Solicitors for Plaintiffs. [76]

State of California
City and County of San Francisco—ss.

C. W. DEAL, being first duly sworn, deposes and says: He is an officer, to-wit, Secretary of Ferryboatmen's Union of California, a corporation, one of the plaintiffs above named, and duly authorized to make this verification on its behalf; that he has read the foregoing Bill in Equity to Enforce Decree and knows the contents thereof and the same is true of his own knowledge, except as to the matters therein stated on information and belief, and to those matters he believes it to be true.

C. W. DEAL

Subscribed and sworn to before me this 27th day of September, 1933.

[Seal] KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California. [77]

EXHIBIT "A"

[Title of Court and Cause—No. 1955.]

JUDGMENT ENTERED UPON ARBITRATION AWARD UNDER RAILWAY LABOR ACT

It appearing to the Court and Judge thereof from all the records, papers and files herein that a controversy having existed between the certain railroads above mentioned (hereinafter referred to as the carriers) and certain employees of said carriers, represented in these proceedings by the Ferryboatmen's Union of California above mentioned and,

It appearing further that the parties hereto have attempted to settle said controversy between them by submission to a Board of Arbitration in accordance with the provisions of the Act of Congress known as the Railway Labor Act, said submission being in accordance with a certain agreement to arbitrate on file herein, which agreement provides in part that any award of the Board as to wages shall become effective as of January 1, 1927, and as to other rules, that the award shall become effective as of the first day of the month following the date on which the [78] award is filed (which date of filing, as appears later herein, is October 31, 1927, and which therefore makes November 1, 1927, the effective date of such rules, except as hereby modified) said agreement being expressly incorporated as part of this judgment as if herein set out in full, and

It appearing further that said Board of Arbitration having met duly and regularly and having heard all the evidence and arguments offered by the respective parties and their counsel and said Board having duly and regularly made its Award in said Arbitration proceedings in accord with said Railway Labor Act and having so made and filed in this court said Award on October 31, 1927, which said Award reads in full as follows:

"AWARD AND DECISION

We, the undersigned, members of the Board of Arbitration, appointed under the provisions

of the Railway Labor Act of 1926 entitled 'An Act to Provide for the prompt disposition of disputes between carriers and their employes, and for other purposes', to arbitrate certain differences specified in an agreement to arbitrate, made and entered into the 7th day of January, 1927, between the Atchison, Topeka & Santa Fe Railway (Coast Lines); Northwestern Pacific Railroad Company; Southern Pacific Company (Pacific Lines); Western Pacific Railroad Company and the Ferryboatmen's Union of California, after full and careful consideration of the evidence submitted in the case, do hereby award and decide as follows regarding the specified differences:

Rates of Pay

Rule 2. Passenger and Car Ferries, and Tugs towing Car Floats

Firemen	$146.35	per month
Deckhands	$139.40	per month
Cabin Watchmen	$139.40	" "
Night Watchmen	$120.00	" "
Matrons	$ 85.00	" "
Fire Boats:		
Firemen	$ 97.57	" "
Deckhands	$ 92.94	" "

Hours of Service

Rule 6.

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions:

(1) On boats with two crews, watches may be separated by an interval of time. [79]

(2) Extra crews may be used on any day it is found necessary to operate one or two crewed boats beyond assigned hours of regular crews.

(3) Where three crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed twenty-four (24) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.

(4) Where two crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed sixteen (16) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.

(5) On boats operating out of Vallejo Junction crews may be assigned twelve (12) hours per day and not to exceed forty-eight (48) hours per week.

(6) On one and two crewed tugs towing car floats crews may be worked not to exceed (9) hours and twenty (20) minutes per watch.

(7) On three crewed tugs, towing car floats and car ferries, except on Carquinez Straits,

crews may be assigned twelve (12) hours on watch with twenty-four (24) hours off watch, provided such assigned watches average forty-eight (48) hours per week within the time required to bring it about.

(8) On Fire Boats, crews will work twenty-four (24) hours on and then twenty-four (24) off without pay for time off.

(9) Limit any where provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume of traffic which cannot be handled on schedule trips.

(10) Watches on three crewed boats shall not begin or terminate between (1) A.M. and six (6) A.M.

(11) Employes required to operate boats to and from yard shall be paid regular run rates.

(12) Night Watchmen may be assigned on twelve (12) hour watches four (4) days per week.

Overtime

Rule 8.

The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid

for in addition to the monthly salary at the pro rata rate. [80]

(Signed) CHAS. D. MARX
Chairman
(Signed) W. H. YOUNG
(Signed) LOUIS BLOCH
(Signed) JAMES L. DUNN

We dissent:

(Signed) F. L. BURCKHALTER
(Signed) J. A. CHRISTIE"

Dated at San Francisco on the 31st., day of October, 1927.

And it appearing further than on November 9, 1927, said carriers filed a petition to impeach said Award and that on February 9, 1928, an order was duly made and entered by this Court confirming said Award and dismissing said petition to impeach said Award and,

It appearing further said carriers took an appeal from said Order and Decision of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit, which court on August 20, 1928, affirmed said order and decision of said District Court confirming said Award and dismissing said petition to impeach the same, and

It appearing further that on May 19, 1928, the parties hereto entered into a stipulation which was filed herein on May 22, 1928, reading in part as follows:

"1. That the ten dollars ($10.00) per month increase made by said award is to be put into

effect and paid beginning May 1, 1928, and is to remain in effect until April 1, 1929, and thereafter subject to the 30-day provision in the existing contracts between the Ferryboatmen's Union of California and the respective carriers, copies of which contracts are exhibits in this case and are on file in the records of this Court.

2. That the $10.00 per month increase is to be retroactively paid to January 1, 1927; payment of such retroactive increase is to be made to the employees in service during all or any part of the period from and including January 1, 1927, to and including April 30, 1928, as early as practicable and not later than June 15, 1928.

3. That if the above entitled Circuit Court of Appeals affirms the decree confirming the award the retroactive date of the new watch rules which are a part of that award shall [81] be advanced from November 1, 1927, to March 1, 1928.

4. On the coming down of the remittitur or mandate from the Circuit Court of Appeals to the District Court the judgment of the District Court shall incorporate and confirm the terms of this stipulation irrespective of whether said Circuit Court of Appeals affirms or reverses the judgment and order of the District Court heretofore rendered herein."

And it appearing further that the determination of said Circuit Court of Appeals affirming said ap-

peal having been duly certified by the Clerk of said Court to this Court and that on September 20, 1928, the mandate of said Circuit Court of Appeal was duly issued and forwarded to the Clerk of this Court and filed herein and it being provided in the Railway Labor Act as as follows:

> "The determination of said Circuit Court of Appeals upon said question shall be final and being certified by the Clerk thereof to said District Court, judgment pursuant thereto shall thereupon be entered by said District Court."

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Award of the Board of Arbitration hereinbefore set forth dated October 31, 1927, and filed in this court on said date (as modified by said stipulation) be and the same hereby is confirmed and entered as a judgment of this court and, in accordance with the above,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that subject to the thirty (30) day provision in existing contracts between the said Ferryboatmen's Union of California and respective carriers and subject to the terms of said arbitration agreement, the rates of pay fixed by said award (and therein denominated Rule 2) shall become effective as of January 1, 1927, and as and from said date (until modified as in said contracts and agreement provided) said carriers and each of them shall pay said employees the following wages: [82]

Passenger and Car Ferries, and Tugs Towing Car Floats:

Firemen	$146.35	per	month
Deckhands	$139.40	"	"
Cabin Watchmen	$139.40	"	"
Night Watchmen	$120.00	"	"
Matrons	$ 85.00	"	"

Fire Boats:

Firemen	$ 97.57	"	"
Deckhands	$ 92.94	"	"

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that (subject also to all of said contracts and agreement) the rule pertaining to hours of service (and in said Award denominated as Rule 6) as re-written in said Award shall become effective as and from March 1, 1928, and as and from said date (until modified as in said contracts and agreement provided) said carriers and each of them shall observe and put into effect said Rule 6 as set out in said award and reading follows:

"Hours of Service

Rule 6.

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions:

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it

is found necessary to operate one or two crewed boats beyond assigned hours of regular crews.

(3) Where three crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed twenty-four (24) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.

(4) Where two crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed sixteen (16) hours and no crew works over forty-eight (48) hours in six (6) consecutive days. [83]

(5) On boats operating out of Vallejo Junction crews may be assigned twelve (12) hours per day and not to exceed forty-eight (48) hours per week.

(6) On one and two crewed tugs towing car floats crews may be worked not to exceed nine (9) hours and twenty (20) minutes per watch.

(7) On three crewed tugs, towing car floats and car ferries, except on Carquinez Straits, crews may be assigned twelve (12) hours on watch with twenty-four (24) hours off watch, provided such assigned watches average forty-eight (48) hours per week within the time required to bring it about.

(8) On Fire Boats, crews will work twenty-four (24) hours on and then twenty-four (24) off without pay for time off.

(9) Limit any where provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume of traffic which cannot be handled on schedule trips.

(10) Watches on three crewed boats shall not begin or terminate between (1) A. M. and six (6) A. M.

(11) Employes required to operate boats to and from yard shall be paid regular run rates.

(12) Night Watchmen may be assigned on twelve (12) hour watches four (4) days per week."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rule pertaining to wages for overtime (denominated in said award as Rule 8) shall, as and from January 1, 1927 (and subject to said contracts and agreement) read as in said award set out, and said carriers and each of them shall observe and put into effect said Rule 8 as so set out (until modified as in said contracts and agreement provided) and shall pay all overtime due or to become due in accordance with said Rule 8, said rule reading as follows:

"Overtime

Rule 8.

The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess [84] of the present

recognized straight time assignment shall be paid for in addition to the monthly salary at the prorate rate."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above named carriers and each of them shall, through their respective proper officers, agents, superintendents and employees make such orders and issue such instructions as will put said wages and rules into effect as of the effective dates above mentioned, (and thereafter until changed as in said contracts and agreement provided) and as will cause all of said employees to be paid all back pay retroactively or otherwise due to said employees or any of them in accordance with said award and this judgment, and respondent shall have its costs herein as taxes in the sum of.................................. Dollars.

Dated: San Francisco, California. Sept. 29, 1928.

A. F. ST. SURE

District Judge. [85]

EXHIBIT "SP"

Firemen

1. Anderson, Carl J.
2. Anderson, Conrad
3. Braumiller, Emil
4. Brennan, J. J.
5. Bunatos, Tom
6. Catcher, M. R.

6a. Chalmers, Alex (120)

7. Costa, A. L.
8. Crandell, Horace L.
9. Cummins, Tom
10. Curtis, Gilbert E.
11. Daniloff, Nicholas
12. Davidson, George
13. Dineen, Michael

Firemen—(continued)

14. Dion, David
15. Domingoes, Joseph R.
16. Dunn, James N.
17. Edwards, Zene M.
18. Eide, Hans
19. Enos, John
20. Esteller, Joaquin
21. Fernandez, Roger
22. Fernandez, Y.
23. Fitzgerald, M. J.
24. Foss, Reidar
25. Gallagher, Cornelius
26. Gardner, Robert E.
27. Gluch, Sam
28. Gonzales, Raymond
29. Hagberg, N. A.
29a. Hanson, Nils O. (167)
30. Harner, Hoyt I.
31. Hartley, Arthur C.
32. Hayden, John J.
33. Heineman, Fred S.
34. Holland, Michael
35. Hooper, Robert L.
36. Hope, Finn
37. Hosier, Leon
38. Ives, Claude La Vaughn
39. Johansen, Adolph
39a. Karsten, Herbert (183)
40. Kennedy, Louis J.
41. Kennedy, Samuel
42. Klemmick, Alfred H.
43. Knoblanch, A. J.
44. Lally, John
45. Lally, Martin F. (191a)
46. Leimer, Louis J.
47. Leland, Earl
48. Linehan, James L.
49. Linhares, Joe
50. Lopes, John P.
51. Lyons, Joseph E.
52. Malcomson, John
53. Mardis, Louis
54. McGue, James
55. McIntyre, A. B.
56. Murray, Robert E.
57. Nissen, James A.
58. Noake, George
59. Olson, Nils
60. Oyarzo, Edwin M.
61. Perry, M.
62. Perry, Manuel
62a. Phillips, Eugene T. (247)
63. Price, Fred M.
64. Price, Lloyd
65. Pritchard, Charles
66. Rahill, Walter
67. Ransom, R. B.
68. Rico, E.
69. Roberts, Hubert A.
70. Rowland, Lusky
71. Sancken, Louis
72. Scholl, Joseph A.
73. Sliscovich, John J.
74. Stanford, S. B.
75. Stein, Frank
75a. Thomas, John J. (285)
76. Tinker, L. C.
77. Van Ansdall, L. W.
78. Wall, Phil E.
79. Wemmer, Edwin
80. Wendelbro, Fred M.
81. White, Henry F.
82. Wilkinson, Geo.
83. Wolslegel, Erwin [86]

EXHIBIT "SP"

Deckhands

84. Akimoff, Viacheslav
85. Algrava, Peter
86. Alves, Edwin V.
87. Anderson, C. W.
88. Anderson, Carl I.
89. Anderson, Lloyd L.
90. Avelar, Antonio
91. Avelino, Walter
92. Babb, Dmpsey E.
93. Ballard, Cecil J.
94. Banks, Frank J.
95. Barrett, Edward B.
96. Barton, Emery V.
97. Batchelder, James
98. Batchelder, Lawrence
99. Bennett, Ernest C.
100. Benson, Albert R.
101. Berger, Adolph L.
102. Bertao, John
103. Bertolani, Sebastiano
104. Bettencourt, Carmel
105. Bird, Herbert C.
106. Borges, George C.
107. Botzer, Max F.
108. Bradley, James
109. Bradley, Joseph
110. Braga, J. R.
111. Braz, Joseph
112. Brickey, John A.
113. Brosnan, Denis
114. Bruce, Chas. L.
115. Burgstrom, Albert C.
116. Cannistra, Antonio
117. Capello, John F.
118. Castro, Antone
119. Cepo, Joseph
120. Chalmers, Alex (6a)
121. Coelho, Manuel
122. Collosi, Angelo
123. Conroy, Thomas J.
124. Correia, John R.
125. Correia, Raymond A.
126. Correia, Raymond C.
127. Corvello, Alfred
128. Cory, Edmund K.
129. Costanho, John
130. Dalke, Chas.
131. Dalke, Jake
132. Danberg, Karl F.
133. Delmore, James A.
134. Dewerd, Adrian J.
135. Dias, C. J.
136. Durkee, Ralph A.
137. Eastman, Gus
138. Edgerton, Clark
139. Edwards, Bert E.
140. Ervin, Henry A.
141. Evenson, John E.
142. Everett, Charles
143. Fernandez, Julius
144. Fernandez, V. A.
145. Ferriera, Jesse K.
146. Foley, Martin
147. Foster, Charles
148. Freitas, John
149. Freitas, John C.
150. Freitas, Thomas
151. Friebe, Erwin
152. Friedrichs, Gus
153. George, Peter S.
154. Goncalves, Joseph F.
155. Gosch, Emil E.
156. Green, Charles
157. Green, George
158. Griffin, Edw.
159. Gruzdeff, J. E.
160. Gunderson, Trygve
161. Hall, James T.
162. Hand, Edward
163. Hansen, Chris. M.
164. Hansen, Hans K.
165. Hansen, Hans P.

166. Hansen, Victor
167. Hanson, Nils O. (29a)
168. Harper, Joseph L.
169. Hendricks, Henry C.
170. Henriques Fancisco P.
171. Hitchcock, Henry
172. Horacek, Joseph
173. Hughes, Albert G.
174. Ignacio, Manuel F.
175. Iversen, Harold
176. Iversen, Johan I.
177. Jerome, Manuel
178. Jogoleff, Peter
178a. Joaquin, M. (NWP 19)
179. Johansen, Hans T.
180. Johnson, E.
181. Johnson, Halvor
182. Jones, Albert H.
183. Karsten, Herbert (39a)
184. Kayser, George H.
185. Kientz, Arch L.
186. King, F. G.
187. King, Vaughn M.
188. Knutsen, John L.
189. Kristensen, John M.
190. Kritsky, Dimitry D.
191. Laine, Andrew
191a. Lally, Martin F. (45)
192. Lamoureaux, Eugene
193. Larsen, John [87]
194. Lerch, Adalbert R.
195. Levenhenko, Theo.
196. Levine, E.
197. Lomba, Charles Q.
198. Lomba, John Q.
199. Lombard, Henry V.
200. Lopes, John
201. Lueboke, Elmer
202. Lukas, Joe
203. Marks, Joseph R.
204. Marshall, J. J.
205. Martin, John
206. Mason, Sydney B.
207. Massey, Cornelius
208. Mattias, Jose M.
209. Mathisen, Anton
210. McCartan, Chas.
211. McCarthy, Michael
212. McNamara, John E.
213. Messer, Allen R.
214. Meyer, John C.
215. Miller, Antone F.
216. Moniz, Antone P.
217. Moniz, Antonio
218. Moniz, Joe
219. Moran, John P.
220. Morris, Chas. C.
221. Morrison, Roscoe
222. Moyer, John
223. Murphy, Peter B.
224. Nadjaf, Aslan
225. Naro, Joseph
226. Nelson, Victor
227. Nielsen, Harold E.
228. Nilsson, Martin
229. Noonan, Wm.
230. Oldham, Albert E.
231. Ollino, Carlo
232. Olsen, Arthur A.
233. Olsen, Harold A.
234. Olsen, Sverre K.
235. Olson, Erick G.
236. Olson, Ole
237. O'Neill, Michael
238. Oupe, Paul
239. Park, Henry T.
240. Parke, Wm. L.
241. Paulino, Manuel
242. Paulsen, W. B.
243. Penney, Lester E.
244. Perry, A. A.
245. Perry, Frank J.

EXHIBIT "SP"

Deckhands (continued)

245a. Perry, M. (61)
246. Perry, Ray J.
247. Phillips, Eugene T. (62a)
248. Pimentel, Joe
249. Popoff, Nicholas N.
250. Puhar, Joseph
251. Quirk, George
252. Raynor, Robert G.
253. Reilly, Francis J.
254. Ritchie, George
255. Rogers, Manuel G.
256. Rose, Jesse
257. Routery, Harold
258. Rubanow, K.
259. Samuelson, John
260. Santos, K. R.
261. Sargent, Sydney
262. Schurr, John K.
263. Seitz, Max A.
264. Serpa, Frank
265. Sevan, Alton
266. Sherrill, H. D.
267. Sherrill, Worth C.
268. Simpson, Frank
269. Smetanin, Alexander
270. Smetanin, Victor
271. Smith, Edward
272. Smith, James J.
273. Smyth, Leo
274. Soltan, Manuel G.
275. Souza, Antone F.
276. Souza, A. P.
277. Souza, John M.
278. Stangeland, Jacob
279. Stevenson, V. J.
280. Stillings, Eugene
281. Swanson, Arthur
282. Swanson, Harry
283. Swiers, Henry
284. Theohares, N.
285. Thomas, John J. (75a)
286. Thompson, Fay
287. Thomassen, Thomas G.
288. Tomkinson, Ernest
289. Triguero, Antone
290. Trigueiro, M. F.
291. Ushanoff, Basil
292. Valladao, A. A.
293. Vargas, John A.
294. Vlasich, L.
295. Ward, Fred
296. Weaver, Wm.
297. Wilkman, Charles
298. Williams, Wm.
299. Wilson, Dudley
300. Young, Peter
301. Zachary, Alex.

Watchman

302. Gundina, Chas. W.

[Endorsed]: Filed Sep. 27, 1933. [88]

[Title of Court and Cause No. 3635-S.]

ANSWER OF DEFENDANT SOUTHERN PACIFIC COMPANY

Comes now Southern Pacific Company, defendant, not waiving, but expressly reserving all objections heretofore made to plaintiff's "Bill in Equity to Enforce Decree", by its Notice of Motion to Require Plaintiffs to Elect, and by its Notice of Motion to Dismiss said Bill, and answering said Bill, admits, denies and avers as follows:

I

Answering Paragraph I of said Bill of Plaintiffs' First Cause of Action, defendant admits the allegation of said paragraph insofar as it relates to Ferryboatmen's Union of California, an unincorporated association, but defendant has neither knowledge, information nor belief on the subject and therefore denies that on October 2, 1931, said unincorporated association transferred or assigned to said Ferryboatmen's Union of California, a non profit corporation, all of its rights or interest in the decree [89] herein mentioned.

II.

This defendant admits the allegations of Paragraph II of said Bill.

III.

Answering Paragraph III of said Bill, this defendant admits that at all times mentioned herein said unincorporated association constituted a labor

union, as therein stated, but defendant has neither knowledge, information nor belief on the subject to enable it to answer, and therefore denies that said incorporated union was, or now is, the duly designated and acting representative of said employes as defined or provided for in the Railway Labor Act heretofore enacted by the Congress of the United States or was or is the duly designated and acting representative of "certain employes" referred to in the above-mentioned proceeding.

IV.

Answering Paragraph IV of said Bill, this defendant admits that it was, and still is, a carrier, as the same is defined in said Railway Labor Act, and was, and still is, an interstate carrier, subject to the provisions of said Act, but denies that at all of any of said times the members of said union, both unincorporated and incorporated, were employes as the same are defined in said act.

V.

Answering Paragraph V of said Bill, this defendant denies that in the year 1925 said employes, as represented by said union, agreed in writing with this defendant as to what wages or working conditions should govern employes, but admits that in the year 1925 it entered into an agreement in writing with said Ferryboatmen's Union of California, an unincorporated association, as to wages and working conditions, and alleges that a copy of said

agreement is attached hereto, marked Exhibit "A", and made a part [90] hereof. On its information and belief this defendant alleges that said agreement is the agreement referred to by plaintiff in Paragraph V of said Bill. This defendant denies that said agreement or writing, or any other agreement or writing with said unincorporated association or incorporated association or union as representative of any employes, contained any terms or provisions other than those shown in the said agreement, a copy of which is Exhibit "A" hereto. Defendant further alleges that said agreement marked Exhibit "A" is the only agreement, written or oral, that ever existed between this defendant and said unincorporated association, or any other association and/or said employes referred to in plaintiff's Exhibit "S.P." and made part of said Bill, and denies that any agreement, or agreements, or understanding between said union, incorporated or unincorporated, or any of said employes, provided that any employe should be paid for overtime in addition to said monthly salary, said overtime to be on an hourly wage basis ascertained by pro-rating the regular monthly salary by the number of hours straight time fixed by his position in said agreement, but on the other hand, alleges that all of the terms and conditions governing working hours, monthly salary, overtime or hourly wage were fixed by agreement attached (Exhibit "A" hereto).

VI.

Answering Paragraph VI of said Bill, this defendant admits:

(1) That in the year 1927 a controversy arose and existed between it and its said employes represented by said Ferryboatmen's Union, an unincorporated association; but alleges that said controversy was a dispute between the defendant and said employes not settled in conference between them in respect to changes in rates of pay, rules or working conditions, which changes were desired by the Ferryboatmen's Union, an unincorporated association, on behalf of said employes, and were not [91] agreeable to, or desired by this defendant;

(2) This defendant avers that said dispute was a dispute as defined in Section 5 of said Railway Labor Act, and particularly Subdivision (b) thereof;

(3) This defendant avers that contemporaneously with this controversy and dispute, a similar controversy and dispute existed between the employes of The Western Pacific Railroad Company, the Atchison, Topeka and Santa Fe Railway Company and Northwestern Pacific Railroad Company, and alleges that in such dispute said employes were represented by said Ferryboatmen's Union, an unincorporated association, and in connection with said disputes this defendant alleges that on the 7th day of January, 1927, an agreement was entered into between all of said companies, including this defendant, and their employes, known as marine

firemen, deckhands, cabin watchmen, night watchmen and matrons, employes in the service of each of said companies, or some of them, and represented by Ferryboatmen's Union of California, an unincorporated association, and that said agreement was entered into between said parties as provided in section 7 of said Railway Labor Act. A copy of said agreement is hereunto attached, marked Exhibit "B" and made a part hereof.

And further answering Paragraph VI of said Bill, this defendant alleges that said Exhibit "B" is a copy of the only agreement to arbitrate ever entered into under said Railway Labor Act between this defendant and its employes herein referred to, and represented by said unincorporated association as to any issue tendered by said Bill in Equity.

VII.

Answering Paragraph VII of said Bill, this defendant admits:

(1) That arbitration proceedings in accordance with said agreement were had under the provisions of and pursuant to said [92] Railway Labor Act, and admits in such proceedings an award was duly made governing the defendant herein and the members of said Ferryboatmen's Union of California, an unincorporated association;

(2) This defendant admits that said arbitration award was filed in accordance with said agreement on October 31, 1927, and by the terms of said agreement said award became effective as of No-

vember 1, 1927; but denies that it became effective as to hours of labor only, as of November 1, 1927. This defendant alleges that said arbitration award is as set forth in the judgment, a copy of which is attached as Exhibit "A" to plaintiffs' Bill in Equity. This defendant denies that said award contained any terms or declarations other than those appearing in the copy thereof set forth in said Exhibit "A", attached to said Bill.

(3) Further answering Paragraph VII, defendant denies that it continued at any time to employ "said former 12-hour men", or any other men, or employes, in excess of eight hours per day or on various watches averaging 12 hours per day until on or about September 1, 1928, and hereby alleges that it from time-to-time continued in employment in the same capacities certain employes, including plaintiffs' assignors, who had formerly and prior to said arbitration agreement been employed as so-called "12-hour men", and so continued them upon the same basis or hours of service and on the same regular, assigned watches as they and all of the so-called "former 12-hour men" had been employed prior to said arbitration agreement; that the hours of their employment were as follows: 12 hours on watch followed by 24 hours off watch and off duty, followed by 12 hours on watch and on duty, alternating in 12 hours on duty and 24 hours off duty, thus making their hours of service in the aggregate an average of 56 hours per

week (as "Week" is hereinafter defined) in a continuous 12-24 hour service of three weeks. [93]

By "day" as used in this answer is meant the 24 hours next succeeding the beginning of a duty period on watch worked by an employe.

By "week" as used in this Answer, unless from the context a different meaning appears, is meant seven consecutive periods of time of 24 hours each.

VIII.

This defendant admits the averments of Paragraph VIII of said Bill.

IX.

Answering Paragraph IX of said Bill, defendant denies that the parties entered into an agreement, or any agreement, on May 19, 1928; but alleges that on May 19, 1928, an agreement was entered into between said unincorporated association and defendant, together with Northwestern Pacific Railroad Company, Atchison, Topeka and Santa Fe Railway Company and Western Pacific Railroad Company, which was embodied in a stipulation filed in this Court, and alleges that the operative portions of said stipulation are set forth in the copy of said judgment, attached to said Bill, and marked Exhibit "A".

Further answering said Paragraph IX, this defendant denies to and/or including, or on or about the first day of September, 1928, or at any time, it continued to employ all of the "said former

12-hour men" on daily watches averaging 12 hours per day, or any daily watches of any average hours whatever, notwithstanding said award or said agreement, but in this behalf avers that following the signing of said arbitration agreement defendant continued to employ some of the "said former 12-hour men" on regular, assigned watches averaging 56 hours per week in a spread of three consecutive weeks, and the employment of said [94] employes was in alternating periods of 12 hours on duty or "on watch" and 24 hours off duty, or "off watch".

This defendant further alleges that said employment was not within any of the ten exceptions to Rule 6 of said Agreement (Exhibit "A" hereto), nor was it within any of the 12 exceptions under said Rule 6 as amended by said award, but that it was merely a continuation of the watches and watch hours prescribed under, and designated as "(a) Rule 6" of said agreement as it stood prior to January 1, 1927, and as shown in Exhibit "A" hereto.

Further answering Paragraph IX, defendant admits that said agreement entered into on May 19, 1928 was signed as alleged therein.

X.

This defendant admits the allegations of Paragraph X of said Bill.

XI.

Answering Paragraph XI of said Bill, this defendant admits the allegations thereof insofar as said paragraph quotes the rules set out in said judgment, but specifically denies that notwithstanding the agreement of the parties or the judgment based on said award, this defendant continued to employ "said former 12-hour men" on daily watches averaging in excess of 8 hours per day—to-wit: on watches averaging 12 hours per day, or until on or about September 1, 1928, and denies that "said former 12-hour men" were employed other than as indicated herein, but in this behalf alleges that certain of said "former 12-hour men" were employed on regular assigned watches for a period of 12 hours, then were off duty 24 hours or more, and that at none of the times mentioned herein were said certain men employed daily, or more than 56 hours per week as "week" is defined herein. [95]

XII.

Answering Paragraph XII of said Bill, this defendant denies that during the period from and including March 1, 1928 to and including September 1, 1928 all of the "said former 12-hour men" were employed each day in excess of eight hours per day, as fixed in said award, and denies that "said former 12-hour men" were employed otherwise than as herein alleged.

Further answering said Paragraph XII, this defendant denies that the exact number of hours worked each day by each man for this defendant in excess of eight hours per day is not known to plaintiffs herein, but admits that the same may be ascertained from the time cards and/or other records in the possession of this defendant. Defendant further denies that the ascertainment of the exact amount due each man depends upon many computations or examinations of records, all of which will be long and complicated, or long or complicated, and in that behalf this defendant alleges that no accounting is necessary to be had by the parties; that defendant has already furnished to said plaintiffs the exact hours worked each day by each man in excess of eight hours per day between March 1, 1928 to September 1, 1928.

Further answering said Paragraph XII, this defendant denies that notwithstanding "said former 12-hour men" have been employed in excess of the fixed hours per day as in said Bill alleged, the overtime due said men for the alleged excess hourage has not been paid to said men, or any of them, but on the other hand alleges that this defendant, prior to January 1, 1929, paid all of its said employes, designated as "said former 12-hour men" all of the amounts due them under said agreement, award, stipulation and judgment mentioned herein for overtime or on any other account, and further denies that the total amount now due, owing

or unpaid for said overtime from defendant herein aggregates [96] a sum in excess of Forty Thousand Dollars ($40,000.00) or any other sum at all.

XIII.

Answering (a) of Paragraph XIII of said Bill, this defendant denies that the jurisdiction of this Court arises out of the fact that this bill is ancillary to or by way of enforcement of a decree, or any decree, already rendered by this Court herein, or out of the further fact that this Court has inherent power to enforce its own decrees. This defendant admits that said decree was rendered on September 29, 1928.

Answering (b) of Paragraph XIII of said Bill, this defendant denies that this jurisdiction is also supported, or supported at all, by the fact that this proceeding arises out of the law regulating commerce, to-wit: The Railway Labor Act, and defendant specifically denies that this is a suit to enforce a judgment rendered pursuant to that Act, or any act, or any law regulating commerce, or otherwise, or at all.

Answering (c) of Paragraph XIII of said Bill, this defendant denies that this suit is ancillary to a proceeding already before this Court, or of which this Court has jurisdiction, and denies that this suit is one of the cases referred to in the provisions of Section 24 (Subdivision "first") of the Judicial Code or Section 24 (Subdivision "eighth") of said Judicial Code, and denies that the amount involved

in this litigation or the sum in controversy is in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, or any other sum at all.

In this connection defendant avers that any and all relief to which plaintiff is entitled lies solely within the provisions of the Railway Labor Act herein referred to.

Answering (d) of Paragraph XIII of said Bill, this [97] defendant denies that the suit is ancillary to a proceeding now pending herein in equity, to-wit: the proceeding above referred to, or numbered In Equity 1955-S, or that this is a suit to enforce a decree already rendered in equity in said proceeding in equity or upon the further ground that the equitable remedy of accounting is necessary to give plaintiffs adequate relief or upon the further ground that plaintiffs have no plain, speedy or adequate remedy at law.

Further answering (d) of said paragraph, this defendant alleges that plaintiffs had at all times herein mentioned, and now have, a plain, speedy and adequate remedy under the provisions of the Railway Labor Act herein referred to.

ANSWERING PLAINTIFFS' SECOND CAUSE OF ACTION, AS SET FORTH IN SAID BILL IN EQUITY TO ENFORCE DECREE, THIS DEFENDANT ADMITS, DENIES AND AVERS AS FOLLOWS:

I.

Defendant refers to all of the admissions, denials and averments set forth in its foregoing Answer

to plaintiffs' First Cause of Action, and by this reference incorporates the same as a part of its defense to plaintiffs' Second Cause of Action to all intents and purposes as if set out herein in full.

II.

Defendant has no knowledge, information or belief upon the subject sufficient to enable it to answer, and therefore denies that prior to the filing of suit herein "said former 12-hour men" individually assigned or transferred to the members of said unincorporated association, collectively, including C. W. Deal as one of said members, said judgment or [98] any judgment, or of their individual rights or money, or backpay alleged to be due under said judgment, and denies that said members, including said C. W. Deal or said unincorporated association, prior to the filing of suit herein or at any other time, or at all, transferred or assigned to the said unincorporated union, plaintiff herein, said judgment or individual rights or money or back-pay due thereunder, or at all, and denies that said unincorporated union is now the owner of or the person entitled to collect all of said wages, money, rights or back-pay overtime.

Defendant denies that the names of the employes whose right, title or interest in or to said moneys or back-pay alleged to be due under said judgment are no in the ownership of plaintiffs, but admits that all of the employes whose names are set out in Exhibit "S. P." were at all times mentioned

herein employes of Southern Pacific Company, defendant herein, and denies that said incorporated union is now the owner of, or the person entitled to collect all of said wages, moneys, rights or back-pay overtime.

AND FOR A SECOND, FURTHER AND SEPARATE DEFENSE to each of plaintiffs' causes of action stated and alleged against defendant Southern Pacific Company in said Bill in Equity, this defendant states:

(a) That during the years 1927, 1928 and 1929, and prior thereto, the Ferryboatmen's Union of California was a labor union and an unincorporated association of firemen, deckhands, cabin watchmen and night watchmen embracing within its membership a substantial majority of the employes engaged in such occupations on San Francisco Bay and its tributaries and employed by this defendant in such capacities, and also embracing within its membership a substantial majority of all of said classes of employes so employed by the Atchison, Topeka & Santa Fe Railway [99] Company, Western Pacific Railroad Company and Northwestern Pacific Railroad Company:

(b) That ever since prior to the passage and effective date of the Act of Congress of May 20, 1926, 44 Stats. at L., p. 577 (U. S. Code, Supp. II, Title 45, Secs. 151, et seq.) known as the Railway Labor Act, this defendant has been and now is a corporation duly organized and existing under the laws

of the State of Kentucky and a carrier as defined in paragraph "first", Section 1, of said Railway Labor Act, and each employe of this defendant, whether a member of said association or of the plaintiffs or not, but who has been since the passage of said Railway Labor Act employed by this defendant in the classes of occupations above described by name, is and has been an employe as defined in Subdivision "Fifth" of said Section One of said Railway Labor Act.

(c) During all of the years 1927, 1928 and 1929, said unincorporated association, Ferrybatmen's Union of California, by and through its Secretary and Manager, C. W. Deal, was the representative for the purposes of said Railway Labor Act designated as such by the constituent members of said unincorporated association as provided by its articles of association or by-laws and was such representative as defined in Subdivision "third" of Section Two of said Railway Labor Act.

(d) On the 7th day of January, 1927, a dispute, as defined in Subdivision "fifth" of Section Two of said Railway Labor Act existed between Northwestern Pacific Railroad Company, Atchison, Topeka and Santa Fe Railway Company, Western Pacific Railroad Company, this defendant and certain of their employes of said classes represented by said unincorporated association concerning changes desired by them in rates of pay, rules and working conditions, and said dispute was of the character

referred to in Subdivision "fifth" of Section Two of said Railway Labor Act. It appearing impossible to settle said dispute by mutual agreement, [100] such proceedings were had in conformity with the provisions of said Railway Labor Act—and not otherwise—so that an agreement to arbitrate said dispute was entered into between said parties, on the one hand, and said unincorporated association on the other, pursuant to the provisions of Section Eight of said Railway Labor Act, said agreement also including similar but separable and distinct controversies and disputes cognizable and adjustable under the provisions of said Railway Labor Act, and between said unincorporated association and each of said parties who had agreements with said unincorporated association similar to and for the same purpose as this defendant's agreement hereinafter referred to and a copy of which is attached to this answer as Exhibit "A".

(e) At the time of said dispute which gave rise to said arbitration agreement, the rates of pay, hours and working conditions of the members of said unincorporated association who were so employed by this defendant were governed exclusively by the provisions of a written agreement with this defendant, a copy of which is attached to this Answer, marked Exhibit "A" and made a part hereof, said agreement remained in force and was not modified superseded or set aside thereafter except by the arbitration award hereinafter referred to, the judgment of the United States District Court for the

Northern District of California confirming said award and hereinafter referred to, and the stipulation or agreement of May 19, 1928, the operative portions of which are set forth in said judgment. Nor since the entry of said judgment on said award, which entry was on the 29th day of September, 1928, has there been any modification of or change in said judgment, award, stipulation or Agreement (Exhibit "AA" attached hereto) except as said stipulation and/or judgment have or has the effect of working a modification of or amendments to said agreement (Exhibit "A" attached hereto).

(f) Said agreement to arbitrate was dated January 7, 1927, [101] and a copy thereof is attached to this Answer, marked Exhibit "B" and made a part hereof. Following the execution of said Agreement to arbitrate, the Board of Arbitration appointed thereunder, pursuant to the provisions of said Railway Labor Act to arbitrate the differences specified in said agreement, took testimony and heard arguments and did, in the 31st day of October, 1927, make its award and decision, a copy of which is contained in the judgment of said United States District Court of September 29, 1928.

(g) Said arbitration award was filed pursuant to the provisions of said Railway Labor Act and in accordance with said agreement on October 31, 1927, and on November 9, 1927 the defendant to this action, as party to said agreement to arbitrate and to said award, filed in the United States District Court for the Northern District of California, pursuant

to the provisions of Section Nine of said Railway Labor Act, a petition to impeach said award on each of the grounds (a), (b), and (c) mentioned in Subdivision "third" of said Section Nine of said Railway Labor Act, but said petition did not allege, nor was it stated as a ground for impeachment, that said award was invalid for uncertainty. Thereafter, to-wit, on the 9th day of February, 1928, said United States District Court entered an order denying said petition and within ten days thereafter the defendants to this action appealed from said last mentioned order to the United States District Court of Appeal for the Ninth Circuit, which said Court on August 20, 1928, affirmed said order of said District Court.

Pending said appeal, and on the 19th day of May, 1928, the parties to said arbitration entered into a written stipulation, each of said parties stipulating for itself and as to its own employes and said unincorporated association stipulating for the employes it represented. A copy of said stipulation, so far as it is here material, is included in the judgment of September 29, [102] 1928, next hereinafter referred to.

On September 29, 1928, being advised of the affirmance of its order denying said petition, said United States District Court for the Northern District of California entered a judgment, a copy of which judgment is set out in words and figures as Exhibit "A" to the Bill in Equity herein, and is hereby made a part hereof by reference. Said judg-

ment has never been modified, appealed from, or set aside.

(h) During the months of March to August, 1928, both months inclusive, certain employes of this defendant, including plaintiffs' assignors, who, as this defendant is informed and believes, and therefore states, were also at the same time members of said unincorporated association and were, for the purposes and to the extent specified in said Railway Labor Act, represented by said unincorporated association and its said Secretary and Manager, C. W. Deal, performed services for this defendant as firemen, deckhands and cabin watchmen in and about work upon the ferry boats operated by this defendant on San Francisco Bay as a carrier, as defined in Section One of said Railway Labor Act.

(i) Each of said employes worked some or all of the time during said months, March to August, 1928, both months inclusive, on a so-called 12-hour watch defined by the first paragraph of Rule 6 as it existed in said agreement, Exhibit "A" attached hereto, to-wit:

"Hours of Service

RULE SIX.

Assigned crews, except as hereinafter provided, will work either on the basis of:

(a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off.

or

(b) Eight (8) hours or less on watch each day for [103] six (6) consecutive days.",

and did not work on any of the watches provided for in the exceptions contained in said Rule 6 as such exceptions appear in said Exhibit "A" or on the watch defined in said agreement as "(b) eight (8) hours or less on watch each day for six (6) consecutive days."

This defendant prior to September 30, 1928, fully paid to each of such employes the $10.00 per month increase in monthly wages made by said award to the full extent to which it was then due them, respectively, under the provisions of paragraphs 1 and 2 of the stipulation, the operative portions of which are copied in said judgment, Exhibit "A" attached to said Bill, and continued to pay said $10.00 per month increase in all cases in which the same was due or payable under the provisions of said award and stipulation, and in addition to said $10.00 per month and separate and apart therefrom, this defendant, during the month of September, 1928, caused its accounting and fiscal officials to prepare pay-roll vouchers for such employes for all compensation earned by such employes during the months March to August, 1928, both months inclusive, additional to that they had already been paid. Said pay-roll vouchers were delivered to all of such employes during the month of October, 1928.

Each of said pay-roll vouchers was in the following form:

"Southern
Lines
Pacific No. 36256

PAY-ROLL VOUCHER—SERVICES
SOUTHERN PACIFIC COMPANY
Pacific Lines

San Francisco California, September 30, 1928.

Pay to the
Order of..........................(1)..........................Miscellaneous

The Sum of..............(2-a)..............Dollars $...... (2-b)......

For Additional Compensation Account. [104]

Arbitration Award between So. Pac. Co. and Ferry-boatmen's Union, Oct 31, 1927.

For March to August, 1928, inclusive.

When signed by the Assistant Treasurer or his duly authorized representative and properly endorsed by payee, this voucher becomes a SIGHT DRAFT on this company and is payable at the office of the company at San Francisco, Calif.

F. L. McCaffery,
Auditor

E. A. VanWynen
For Assistant Treasurer

Payable at the option of holder through any bank."

Each of said pay-roll vouchers bore a fac-simile of the signature of F. L. McCaffery, who was then the auditor of said company, and the genuine signature of E. A. Van Wynen, who was then and has since continued to be the authorized representative of the Assistant Treasurer of said company and authorized to sign said voucher as such representative. In the space hereinbefore designated as "(1)", the voucher contained the name of the employe, and in the spaces shown hereinbefore as "(2-a)" and "(2-b)" the voucher bore the amount paid.

Each of said vouchers bore the printed statement on the back thereof:

"Endorse Here

This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within.

....

Payee."

(j) In the month of October, 1928, each of such employes, including plaintiffs' assignors, accepted his said voucher in [105] the form hereinbefore described without objection or protest, and signed the same on the back thereof above the word "Payee" in the form of endorsement hereinbefore copied, and cashed the same and received and retained to his own use the amount represented thereby. None of said employes has returned or offered to return said amount or any part thereof

to this defendant or to any one on its behalf. Plaintiff has not, nor has said unincorporated association or any of plaintiffs' alleged assignors, or any one, returned or offered to return the amount of said voucher so collected and received, or any part thereof, to this defendant or any one on its behalf, or rescinded or offered to rescind his acceptance or cashing of or release signed as aforesaid on the back of said voucher, or any part thereof.

(k) By and by reason of the acts and facts aforesaid, each of said employes released this defendant from all claims and demands for or on account of having, during said six months period, March 1 to August 31, 1928, both days inclusive, worked on said 12-24 hour watches and/or having worked during said period on any one of said watches more than twelve hours.

AND FOR A THIRD, FURTHER AND SEPARATE DEFENSE to each of plaintiffs' causes of action separately stated against this defendant in said Bill in Equity, this defendant states:

This defendant in and by this third, further and separate defense hereby sets up, asserts and relies on a right, privilege and/or immunity arising under the Constitution of the United States, and under a law of the United States, to-wit, the Railway Labor Act, being the Act of Congress passed May 20, 1926, entitled "An Act to provide for the prompt disposition of disputes between carriers and their employes and for other purposes," which is printed

in 44 Statutes at Large, at page 577, et seq., and also appears in United States Code, supp. II, Title 45, Section 151, [106] et seq., which said Act was passed pursuant to the authority granted Congress by paragraph 3 of Section 8 of Article I, of the Constitution of the United States to regulate commerce with foreign nations and among the several states; and this defendant particularly relies on said Railway Labor Act and in particular on the provisions of Subdivision (d) of sub-paragraph "third" of Section 5 of said Railway Labor Act and the first proviso in subdivision (c) of paragraph "third" of Section 9 of said Railway Labor Act, placing the exclusive jurisdiction over a controversy arising over the meaning or application of an award in the Board of Arbitration to be reconvened as provided in said subdivision (d) of sub-paragraph "third of Section 5 of said Railway Labor Act.

(1) This defendant now hereby refers to the allegations of paragraphs (a) to (j), both letters inclusive, of its second, separate and further defense hereinbefore pleaded and restates the same as fully as if such allegations were again herein fully set forth, and in addition thereto states:

(2) That in January, 1929, and after the delivery and cashing of said vouchers by said employes referred to in the first, separate defense herein, said unincorporated association representing its constituent members employed by this defendant, including said employes, presented to this defendant a formal claim that said award, and the judgment affirming

the same, and the stipulation recited in said judgment (and which advanced the retroactive date of the new watch rules from November 1, 1927, to March 1, 1928), bore the meaning and should be so applied that in all cases where on and after March 1, 1928 men were employed on a 12-hour basis—that is to say, on the basis of 12 hours on duty and 24 hours off duty, and so on—each of such men was entitled to four hours overtime for each day that he worked over 8 hours and that this defendant had misapplied said award and stipulation by its [107] payment to men who so worked a lesser sum than a sum that would have been arrived at had said interpretation last mentioned been followed, to which claim said unincorporated association in behalf of its members, including its said assignors, this defendant replied in January, 1929, by stating that it knew of no provision in said award or judgment requiring this company to compensate its employes on said basis named by said unincorporated association, and that this defendant had allowed to its employes referred to by said unincorporated association back-pay allowance in accordance with the provisions of the rules of the award of the Board of Arbitration.

(3) The respective amounts which aggregate the amount sued for herein are amounts claimed by plaintiffs as an assignee, in addition to the amounts heretofore paid the employes of this defendant, whose claims it alleges it holds by virtue of assign-

ments, and said additional amounts are based upon the meaning and interpretation of said award claimed and insisted upon by said unincorporated association in January, 1929, as aforesaid, and in the same month challenged and denied, as aforesaid, by this defendant, and therefore by said claim of said unincorporated association as representing defendants' employes, including plaintiffs' assignors and this defendant's denial of said claim a controversy arose during the month of January, 1929, over the meaning and/or application of said award, as respects the proper method of computing additional compensation in cases where between March 1st and August 31, 1928, both days inclusive, an employe of this defendant as a deckhand or fireman in its ferry service worked the so-called 12-24 hour watch as hereinbefore defined. Said controversy has continued since its said inception and now exists. Said controversy does not include overtime for service over 12 hours on any one watch which overtime, this defendant is informed and believes and therefore states, plaintiff and its predecessors [108] have never contended has not been fully paid for prior to January 1, 1929.

(4) Notwithstanding the provisions of said Subdivision (d) of said sub-paragraph "third" of Section 5 of said Railway Labor Act, said unincorporated association and its alleged successor, Ferryboatmen's Union of California, a non-profit corporation, and each of its assignors have, and each of them has, since the arising of said controversy

failed, neglected and refused and now continue to fail, neglect and refuse, having the ability so to do, to follow or have recourse to the provisions of said subdivision (d) of sub-paragraph "third" of Section 5 of the Railway Labor Act, or to notify the Board of Mediation created by said Act—in writing or otherwise—asking or suggesting the reconvening of said Board or Arbitration, and said Board of Arbitration has not been reconvened and has not considered or passed upon said controversy or on the proper meaning or application of said award in respect of the matters in said controversy, and this Court is therefore, and by reason of the facts in this separate defense pleaded, without jurisdiction to entertain either or any of the plaintiffs' separately stated causes of action in said complaint contained, and plaintiffs' sole remedy, if any they have, is under and by virtue of said provisions of said Railway Labor Act in this separate defense referred to and relied upon.

AND FOR A FOURTH, FURTHER AND SEPARATE DEFENSE to each of plaintiffs' causes of action separately stated against this defendant in said Bill, this defendant avers:

That any and all controversies or differences between plaintiffs and defendant in respect to the matters herein alleged, arise out of the meaning, interpretation and/or application of said arbitration award, Exhibit "A" attached to plaintiffs' Bill, and that by reason thereof defendant alleges and avers

that this [109] Court is without jurisdiction to determine the meaning or interpretation or application of said award; this defendant further avers that the meaning, interpretation or application of said award is solely for the determination of the Arbitration Board herein referred to as provided in Section 5 of the Railway Labor Act, and particularly subdivision "B" thereof.

FOR A FIFTH, FURTHER AND SEPARATE DEFENSE to each of plaintiffs' causes of action separately stated against this defendant in said Bill, this defendant avers:

That the meaning, interpretation or application of said award is solely for the determintion of the Arbitration Board herein referred to as provided in Section the Fifteenth of agreement entered into as set forth in Exhibit "B" hereto; said Section Fifteenth reading as follows:

> "FIFTEENTH: Any differences arising as to the meaning, or the application of the provisions of such award shall be referred for a ruling to the Board, or to a sub-committee of the Board agreed to by the parties thereto; and such ruling, when certified under the hands of at least a majority of the members of such Board, or, if a sub-committee is agreed upon, at least a majority of the members of the sub-committee, and when filed in the same District Court Clerk's office as the original award, shall be a part of and shall have the same force and effect as such original award."

And defendant further avers that in view of the above-quoted provision of Exhibit "B" that plaintiffs, said unincorporated association and its assignors and each of them are estopped from carrying on or proceeding with or prosecuting the above-entitled action or any action or actions, and are estopped from taking any action or actions otherwise than as provided in the above-quoted section.

WHEREFORE, having fully answered, defendant prays that said Bill be dismissed.

DATED this 19th day of March, 1934.

A. A. JONES &
HENLEY C. BOOTH,
Attorneys for Defendant
Southern Pacific Company.

[110]

State of California,
City and County of San Francisco.—ss.

G. L. KING, being first duly sworn, deposes and says:

That he is an officer, to-wit, Assistant Secretary of Southern Pacific Company, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

G. L. KING,

Subscribed and sworn to before me this 19th day of March, 1934.

[Seal] FRANK HARVEY,

Notary Public in and for the City and County of San Francisco, State of California. [111]

AGREEMENT
Between
SOUTHERN PACIFIC COMPANY
(Pacific System)
and
FIREMAN, DECKHANDS, CABIN WATCHMEN, NIGHT WATCHMEN AND MATRONS
Represented by the
FERRYBOATMEN'S UNION OF CALIFORNIA

Date effective January 16, 1925

SCOPE

RULE 1.

These rules shall govern hours of service, working conditions and rates of pay of Marine Firemen, Deckhands, Cabin Watchmen, Night Watchmen and Matrons, employed on passenger, car and automobile ferries, tugs towing car floats and fire boats, operated by above carrier, on San Francisco Bay and tributary waters. They do not apply to employes on river boats.

RATES OF PAY

RULE 2.

PASSENGER AND CAR FERRIES and TUGS TOWING CAR FLOATS

Firemen	$136.35	per month
Deckhands	$129.40	" "
Cabin Watchmen	$129.40	" "
Night Watchmen	$110.00	" "
Matrons	$ 75.00	" "

FIRE BOATS

Firemen	$ 90.90	" "
Deckhands	$ 86.30	" " [112]

NOTE: Employes working broken assignments will be paid in the following manner:

(a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.

(b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365.

(c) On 12 and 24 watches, with one watch off per month, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary, divided by 347.

Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service.

Preservation of Rates

RULE 3.

The minimum rates and all rates in excess thereof, as herein established, shall be preserved.

Rating Positions

RULE 4.

The entering of employes in the positions occupied in the service or changing their classification or work shall not operate to establish a less favorable rate of pay or condition of employment than is herein established.

Basic Day

RULE 5.

Eight (8) consecutive hours shall constitute a day's work.

Hours of Service

RULE 6.

Assigned crews, except as hereinafter provided, will work either on the basis of:

(a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off.

[113]

or

(b) Eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two-crewed boats beyond assigned hours of regular crews.

(3) On basis of Section (a) of this Rule, length of watches may be varied as necessary to arrange

relief, but must average eight (8) hours per calendar day in any cycle of three (3) weeks.

(4) Where two crews are used, watches may be as long as eight hours and forty minutes, provided the combined watches do not exceed sixteen hours and no crews work over forty-eight hours in six consecutive days.

(5) On boats operating out of Vallejo Junction, one crew will be used each day. Employes will work twelve hour watches for two days, with the third day off, without pay for time off, and repeat.

(6) On tugs towing car floats crews working on basis of Section (b) of this Rule may be worked not to exceed nine hours and twenty minutes per watch.

Crews on basis of Section (a) of this Rule will be given one watch off per month. Such watch to be designated by the Railroad.

(7) On fire boats, crews will work twenty-hours on and then twenty-four hours off without pay for time off.

(8) Limit anywhere provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume traffic which cannot be handled on schedule trips. [114]

(9) Watches on three-crewed boats shall not begin or terminate between one (1) A.M. and Six (6) A.M.

(10) Employes required to operate boat to and from yard shall be paid regular run rates.

Relief Terminals

RULE 7.

Crews will be relieved at same terminal where they begin their duties.

Overtime

RULE 8.

The monthly salary now paid the employes covered by this Agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro-rata rate.

Fixing Overtime Rate

RULE 9.

To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment.

NOTE: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner:

(a) On 8 and 16 watches, divide 12 times the monthly salary by 2504.

(b) On 12 and 24 watches, divide 12 times the monthly salary by 2920.

(c) On 12 and 24 watches, with one watch off per month, divide 12 times the monthly salary, by 2776.

Overtime for employes operating under Exception (5) to Rule 6, Fireboat employes and night watchmen, will be computed under Section (b) of this note. [115]

Absorbing Overtime

RULE 10.

Employes will not be required to suspend work during regular hours to absorb overtime.

Computing Overtime

RULE 11.

Overtime shall be computed on the actual minute basis. Even hours will be paid for at the end of each pay period; fractions thereof will be carried forward.

Notified or Called

RULE 12.

When notified or called to work outside of established hours, after having been released from duty, employes will be paid a minimum allowance of four (4) hours.

To Be Called Only in Emergency

RULE 13.

Crews will not be called to work outside of regular assigned hours except in emergency or to take care of an extra heavy volume of traffic that cannot be handled on scheduled trips.

Bulletining of Vacancies

RULE 14.

New positions or vacancies, of thirty (30) days or more, will be bulletined at least semi-monthly for a period of five (5) days and assigned in accordance with Rule 15. Employes filling temporary positions will remain thereon until expiration thereof

or return of employe relieved, except that an employe holding a temporary vacancy, who is the successful applicant for a permanent position, will be placed thereon as soon as practicable after assignment. [116]

Promotion Basis

RULE 15.

Promotions will be based on ability, merit and seniority, ability and merit being sufficient, seniority shall prevail. The Management shall be the judge, subject to appeal as provided for in Rules 21 to 26, inclusive.

Declining Promotion

RULE 16.

Employes declining promotion will not lose their seniority.

Seniority Rosters

RULE 17.

A seniority roster of all employes in each class of service, showing name and date of entering such service, will be posted in a place accessible to those affected. It will be revised in January of each year and be open for correction for a period of sixty days. The duly accredited representative of the employes will be furnished a copy of such roster upon written request.

Seniority Restrictions

RULE 18.

Seniority will be restricted separately to each class of service. It begins at the time employe's pay starts.

Retention of Seniority During Furlough

RULE 19.

Employes furloughed for six (6) months or less will retain their seniority.

Reduction in Force

RULE 20.

In reducing forces, seniority shall govern. When forces are increased employes will be returned to the service in order of their seniority. Employes desiring to avail themselves of this rule, must file their names and addresses with the proper officials at the time of reduction. Employes [117] failing to report for duty (or give satisfactory reason for not doing so) within seven (7) days from date of notification will be considered out of the service.

Investigations

RULE 21.

An employe disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, providing written request is presented to his immediate superior within ten (10) days of the date of the advice of the discipline, and the hearing shall be granted within ten (10) days thereafter.

Decision and Appeal

RULE 22.

A decision will be rendered within seven (7) days after completion of hearing. If an appeal is taken, it must be filed with the next higher officer and a copy furnished the official whose decision is appealed from within ten (10) days after the date of decision. The hearing and decision of the appeal shall be governed by the time limits of the preceding rule.

Representation

RULE 23.

At the hearing, or on the appeal, the employe may be assisted by a Committee of employes, or by one or more duly accredited representatives.

Right of Appeal to Higher Officers

RULE 24.

The right of appeal by employes or representatives in regular order of succession and in the manner prescribed, up to and inclusive of the highest officials designated by the railroad to whom appeals may be made is hereby established. [118]

Transcript

RULE 25.

An employe on request will be given a letter stating the cause of discipline. A transcript of the evidence taken at the investigation or on the appeal will be furnished on request to the employe or representative.

Exoneration

RULE 26.

If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge, if suspended or dismissed, the employes will be returned to former position and paid for net wage loss.

Attending Court

RULE 27.

Employes taken away from their regular assigned duties at the request of the Management, to attend Court or to appear as witnesses for the carrier will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place, and in addition necessary actual expenses while away from home station. Any fee or mileage accruing will be assigned to the carrier.

Transfer by Management

RULE 28.

Employes transferred by direction of the Management to positions which necessitate a change of residence will receive free transportation. over employer's line, for themselves, dependent members of their family and household goods, when it does not conflict with State or Federal laws.

Transfer by Seniority

RULE 29.

Employes exercising seniority rights to new positions or vacancies which necessitate a change of

residence will receive free transportation over employer's line for them- [119] selves, dependent members of their families, and household goods, when it does not conflict with State or Federal laws, but free transportation of household effects need not be allowed more than once in a twelvemonth period.

Validating Records

RULE 30.

Applicants for employment entering the service shall be accepted or rejected within ninety (90) days after the applicant begins work. When applicant is not notified to the contrary within the time stated it will be understood that the applicant becomes an accepted employe, but this rule shall not operate to prevent the removal from the service of such applicant, if subsequent to the expiration of ninety (90) days it is found that information given by him in his application is false. Original letters of recommendation and other papers filed by applicant shall be returned within ninety (90) days, provided copies of the same have also been filed.

Health and Safety

RULE 31.

Health and safety of the employes will be reasonably protected.

Safety Committee Meetings

RULE 32.

Members of safety committees will be paid wage loss suffered as a result of attending safety meetings.

Posting Notices

RULE 33.

Suitable provision may be made in Forecastle of each vessel for posting notices covering Organization business of a non-controversial nature. Copies of all such notices to be furnished supervising officer of the carrier.

Transportation

RULE 34.

Employes covered by this agreement and those dependent upon them for support will be given the same consideration [120] by employing carrier in granting free transportation as is granted other employes in the service.

General Representatives

RULE 35.

General representatives of the employes covered by these rules will be granted leave of absence, without loss of seniority.

Committees

RULE 36.

General and Local Committees representing employes covered by this Agreement will be granted the same consideration by employing carrier as is granted general and local committees representing employes in other branches of the service.

Duly Accredited Representatives

RULE 37.

Where the term "duly accredited representative" appears in this Agreement it shall be understood to mean the regularly constituted committee representing the class of employes on the railroad where the controversy arises, or any representative or representatives the employes directly interested may select or designate.

Date Effective

RULE 38.

This Agreement will be effective as of January 16, 1925, and shall continue in effect until it is changed as provided herein or under the provisions of the Transportation Act, 1920.

Accepted for the Employes:

FERRYBOATMEN'S UNION OF CALIFORNIA,

C. W. DEAL

Secretary and Business Manager

Accepted for the Carrier:

J. H. DYER,

General Manager,

SOUTHERN PACIFIC CO.

(Pacific System) [121]

"EXHIBIT B"

THIS AGREEMENT, made and entered into this Seventh (7th) day of January, 1927, between Atchison, Topeka & Santa Fe Railway (Coast Lines), Northwestern Pacific Railroad Company, Southern Pacific Company (Pacific Lines) and the Western Pacific Railroad Company (hereinafter referred to as parties of the first part), represented respectively by J. A. Christie, Superintendent, W. S. Palmer, President & General Manager, J. H. Dyer, General Manager, and E. W. Mason, Vice President & General Manager, and the marine Firemen, Deckhands, Cabin Watchmen, Night Watchmen and Matrons, employes in the service of such railroads (hereinafter referred to as the party of the second part), as represented by the Ferryboatmen's Union of California, WITNESSETH:

The parties hereto mutually agree and stipulate as follows:

FIRST: The above named railroads are carriers subject to the Interstate Commerce Act; the above named marine Firemen, Deckhands, Cabin Watchmen, Night Watchmen and Matrons are employes of such railroads, and the above representatives are the fully accredited representatives of such railroads and employes respectively.

SECOND: The controversies between the parties hereto, as hereinafter specifically stated, are hereby submitted to arbitration, and such arbitration is

had under the provisions of the Railway Labor Act, approved May 20, 1926.

THIRD: The Board of Arbitration (hereinafter referred to as "the Board") shall consist of six (6) members.

FOURTH: The specific questions to be submitted to the Board for decision are, whether or not there shall be any increase in the wages, or changes in working rules Nos. 6 and 8, of the employes of these railroads, represented by the party of the second part. [122]

The present rates of pay and rates proposed by the employes are as follows:

Classification	Present Rates	Proposed Rates
Firemen	$136.35 per month	$156.35 per month
Deckhands	129.40 " "	149.40 " "
Cabin Watchmen	129.40 " "	149.40 " "
Night Watchmen	110.00 " "	130.00 " "
Matrons	75.00 " "	95.00 " "
	Fire Boats	
Firemen	90.90 " "	104.23 " "
Deckhands	86.30 " "	99.63 " "

RULE 6—HOURS OF SERVICE

(Present Rule reads as follows)

Assigned crews, except as hereinafter provided, will work either on basis of:

(a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off,

OF

(b Eight (8) hours or less on watch each day for six (6) consecutive days.

EXCEPTIONS

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two crewed boats beyond assigned hours of regular crews.

(3) On basis of Section (2) of this Rule, length of watches may be varied as necessary to arrange relief, but must average eight (8) hours per calendar day in any cycle of three weeks.

(4) Where two crews are used, watches may be as long as eight hours and forty minutes, provided the combined watches do not exceed sixteen hours and no crews work over forty-eight hours in six consecutive days. [123]

(5) On boats operating out of Vallejo Junction, one crew will be used each day. Employes will work twelve-hour watches for two days, with the third day off, without pay for time off and repeat.

(6) On tugs towing car floats crews working on basis of Section (b) of this rule may be worked not to exceed nine hours and twenty minutes per watch.

Crews on basis of Section (a) of this rule will be given one watch off per month. Such watch to be designated by the railroad.

(7) On fire boats, crews will work twenty-four hours on and then twenty-four hours off without pay for time off.

(8) Limit anywhere provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume of traffic which cannot be handled on schedule trips.

(9) Watches on three crewed boats shall not begin or terminate between One (1) A.M. and after Six (6) A.M.

(10) Employes required to operate boat to and from yard shall be paid regular run rates.

* * * * * *

The specific questions submitted under Rule 6 are:

(a) Shall the rule remain as written, or

(b) Shall the portion of the rule down to the word "Exceptions" be changed so as to read:

> "Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days", and

(c) If the rule is changed as under (b) hereof whether, and if so to what extent, the exceptions shall be changed [124]

* * * * * *

RULE 8—OVERTIME

(Present rule reads as follows)

> "The monthly salary now paid the employes covered by this Agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate."

The specific questions submitted under Rule 8—Overtime, are:

(a) Shall the present rule providing for pro rata rates of pay for overtime remain in effect, or

(b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?

* * * * * *

FIFTH: In its award the Board shall confine itself strictly to decision as to the questions so specifically submitted to it.

SIXTH: The questions, or any part thereof, as submitted may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of the parties here to and served on the Board, or upon the Chairman of the Board, at any time prior to the making of the award.

SEVENTH: The signatures of a majority of the members of the Board affixed to its award shall be competent to constitute a valid and binding award.

EIGHTH: The Board shall begin its hearings prior to the expiration of the period of ten (10) days from the date on which the last arbitrator necessary to complete the Board is appointed.

NINTH: The Board shall make and file its award prior to the expiration of the period of thirty-five (35) days from the date on which the Board begins its hearings, but the parties hereto may agree, at any time prior to the making of such award, upon

the extension of such period (whether or not previously extended). [125]

TENTH: The board shall hold its hearings in the City of San Francisco, State of California.

ELEVENTH: The award of the Board as to wages shall become effective as of January 1st, 1927, and as to rules shall become effective on the first day of the month following the date on which the award is filed, and shall continue in force, both as to wages, and rules, for the period of one year from the effective date thereof, and thereafter subject to thirty (30) days' notice by or to the railroads.

TWELFTH: The award of the Board and the evidence of the proceedings before the Board relating thereto, certified under the hands of at least a majority of the members of the Board, shall be filed in the Clerks' office of the District Court of the United States for the Northern District of California, Southern Division.

THIRTEENTH: Such award and proceedings so filed shall constitute the full and complete record of the arbitration.

FOURTEENTH: Such award so filed shall be final and conclusive upon the parties thereto as to the facts determined by the award and as to the merits of the controversy decided.

FIFTEENTH: Any differences arising as to the meaning, or the application of the provisions of such award shall be referred for a ruling to the

Board, or to a sub-committee of the Board agreed to by the parties thereto, and such ruling, when certified under the hands of at least a majority of the members of such Board, or, if a sub-committee is agreed upon, at least a majority of the members of the sub-committee, and when filed in the same District Court Clerk's office as the original award, shall be a part of and shall have the same force and effect as such original award.

SIXTEENTH: The respective parties to the award will each faithfully execute the same. [126]

SEVENTEENTH: This constitutes the entire agreement between the parties to submit the matters in controversy to arbitration.

Signed on behalf of the parties of the first part by J. A. Christie, W. S. Palmer, J. H. Dyer and E. W. Mason, and on behalf of the party of the second part by C. W Deal, this day and year as above written

For the Railroads:

Atchison, Topeka & Santa Fe Railway
(Coast Lines)
(Signed) J. A. CHRISTIE,
Superintendent.

Northwestern Pacific Railroad Co.
(Signed) W. S. PALMER,
President & General Manager.

Southern Pacific Company
(Pacific Lines)
(Signed) J. H. Dyer
General Manager.

The Western Pacific Railroad Co.
(Signed) E. W. MASON,
Vice President & General Manager.
For the Employes:
By (Signed) C. W. DEAL,
Secretary & Business Manager, Ferryboatmen's Union of California.

State of California,
City and County of San Francisco.—ss.

On this Seventh (7th) day of January, 1927, before me personally appeared J. A. Christie, W. S. Palmer, J. H. Dyer and E. W. Mason, to me known to be the persons described in and who executed the foregoing agreement, and duly acknowledged the execution thereof.

(Signed) HYWEL DAVIES
Member, Board of Mediation.

State of California,
City and County of San Francisco.—ss.

On this Seventh (7th) day of January, 1927, before me personally appeared C. W. Deal, to me known to be the person described in and who executed the foregoing agreement, and duly acknowledged the execution thereof.

(Signed) HYWEL DAVIES
Member, Board of Mediation.

[Seal of Board of Mediation] [127]

PROPOSED WATCH RULE AND EXCEPTIONS

HOURS OF SERVICE

RULE 6.

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.

EXCEPTIONS:

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two crewed boats beyond assigned hours of regular crews.

(3) On three crewed tugs towing car floats and car ferries, except on Carquinez Straits, crews may be assigned twelve (12) hours on watch with twenty-four (24) hours off watch, provided such assigned watches average forty-eight hours per week within the time required to bring it about.

(4) On one and two crewed tugs towing car floats crews may be worked not to exceed nine (9) hours and twenty (20) minutes per watch.

(5) On passenger and vehicle boats assigned watches may be:

(a) Nine (9), ten (10) or twelve (12) hours on one crewed boats.

(b) Nine (9) or ten (10) hours on two crewed boats;

provided such assigned watches average as nearly as practicable forty-eight (48) hours per week (not less), and provided further that overtime shall be paid for all hourage assigned in excess of an average of forty-eight (48) hours per week.

(6) On Fire Boats crews will work twenty-four (24) hours on and then twenty-four (24) hours off, without payment for time off.

(7) Length of assigned watches on two and three crewed boats may be varied not exceeding forty-five (45) minutes, to arrange [128] relief without payment of overtime and the resulting unequal length of watches shall be equalized by men working watches in rotation.

(8) Extra men shall be paid one (1) day for eight hours, or less, and overtime after eight (8) hours.

(9) Limit anywhere provided on length of watches does not apply in emergency, or when necessary to make extra trips to handle heavy volume of traffic which cannot be handled on schedule trips.

(10) Watches on three crewed boats shall not begin or terminate between one (1) A.M. and Six (6) A.M.

(11) Employes required to operate boat to and from yard shall be paid regular run rates.

12) Night watchmen may be assigned on twelve (12) hour watches four days per week.

San Francisco, Cal.
November 4, 1927.

[Endorsed] Receipt of the within Answer of Defendant Southern Pacific Company is admitted this 19th day of March, 1934.

DERBY, SHARP, QUINBY & TWEEDT,
Attorney for Plaintiffs.

Filed Mar. 19, 1934. [129]

[In action 3636-S plaintiffs filed a "Bill in Equity to Enforce Decree" against the Northwestern Pacific Railroad Company. The allegations of this bill are the same as the allegations of the bill in 3635-S, except for the names of the men involved and the amounts claimed. The data as to the men involved and the amounts paid and claimed appear in the various exhibits introduced by the parties, as set out in the statement of evidence and are printed later herein. As a matter of economy and to avoid unnecessary duplication this bill is not printed herein. The answer in the same case is omitted for the same reasons and because the allegations, except for names and amounts, are identical with the allegations of the Southern Pacific Company in 3635-S, which is printed herein.]

[Title of Court and Cause]

OPINION

ST. SURE, District Judge.

The above entitled cases are the outgrowth of an award filed on October 31, 1927, pursuant to an arbitration held under the Act of Congress known as the Railway Labor Act. (44 Stat. p. 577; 45 USCA Sec. 151, et seq.)

The present controversy is between certain railroads and their employes who are seeking an ac-

counting and back pay for overtime work performed during a six-months period from March 1, 1928, to September 1, 1928.

In 1925, the Atchison, Topeka & Santa Fe Railway, Northwestern Pacific Railroad Company, Southern Pacific Company and the Western Pacific Railroad (hereinafter called the carriers), had an agreement covering "hours of service, working conditions and rates of pay" with their employes classified as marine firemen, deckhands, cabin watchmen, night watchmen, and matrons (hereinafter called the union), "employed on passenger, car and automobile ferries, tugs towing car floats and fire boats" operated by the carriers on San Francisco Bay and tributary waters.

On January 7, 1927, the carriers entered into an agreement with the union to submit to arbitration certain demands of employes for increases in pay and changes in working conditions. The agreement provided: "The specific questions to be submitted to the Board for decision are whether or not there shall be any increase in the wages, or changes in working Rules Nos. 6 and 8 of the employes of these railroads. * * *"

Rule 6 read: "Assigned crews, except as hereinafter provided, will work either on basis of: (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off, or (b) Eight (8) hours or less on watch each day for six (6) consecutive days." Then [181] follows a list of "exceptions", some of which will be referred to later.

Rule 8 read: "The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro-rata rate."

The specific questions submitted under Rule 6 were: "(a) Shall the rule remain as written, or (b) shall the portion of the rule down to the word 'exceptions' be changed so as to read: 'Assigned crews will work on the basis of (8) hours or less on watch each day for six (6) consecutive days'."

The specific questions submitted under Rule 8—Overtime were: "(a) Shall the present rule providing for pro-rata rates of pay for overtime remain in effect, or (b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?"

In its award the board increased wages $10 per month, fixing the rates of pay as follows:

Passenger and car ferries, and tugs towing car floats:

Firemen	$146.35	per month
Deckhands	139.40	" "
Cabin Watchmen	139.40	" "
Night Watchmen	120.00	" "
Matrons	85.00	" "
Fire Boats:		
Firemen	97.57	" "
Deckhands	92.94	" "

The award eliminated the twelve-hour watches, changing Rule 6 to read as follows: "Rule 6. Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days." [182]

The award affirmed Rule 8, above quoted.

Petition for impeachment of the award filed by the carriers was dismissed by this Court and the award confirmed. Upon appeal, the decision of this Court was affirmed by the Circuit Court of Appeals on August 20, 1928. Atchison, T. & S. F. Ry. Co., et al., v. Ferryboatmen's Union of Cal. 28 F. (2) 26.

On May 19, 1928, pending the appeal from decision of this Court to the Circuit Court of Appeals, the carriers and the union entered into a stipulation, the pertinent part of which reads as follows:

> "1. That the ten dollars ($10.00) per month increase made by said award is to be put into effect and paid beginning May 1, 1928, and is to remain in effect until April 1, 1929, and thereafter subject to the 30-day provision in the existing contracts between the Ferryboatmen's Union of California and the respective carriers, copies of which contracts are exhibits in this case and are on file in the records of this Court.
>
> "2. That the $10.00 per month increase is to be retroactively paid to January 1, 1927; payment of such retroactive increase is to be made to the employees in service during all or any part of the period from and including January 1, 1927, to and including April 30, 1928, as

early as practicable and not later than June 15, 1928.

"3. That if the above entitled Circuit Court of Appeals affirms the decree confirming the award the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927, to March 1, 1928.

"4. On the coming down of the remittitur or mandate from the Circuit Court of Appeals to the District Court the judgment of the District Court shall incorporate and confirm the terms of this stipulation irrespective of whether said Circuit Court of Appeals affirms or reverses the judgment and order of the District Court heretofore rendered herein."

After affirmance by the Circuit Court of Appeals, this court, on September 29, 1928, entered a judgment incorporating the award and said stipulation.

During the period from and including March 1, 1928, to September 1, 1928, the carriers, as appears by their answers, continued in employment in the same capacities certain of their employes "who had formerly and prior to said arbitration agreement been employed as so-called '12-hour men', and so [183] continued them upon the same basis or hours of service and on the same regular assigned watches as they and all of the so-called 'former 12-hour men' had been employed prior to said arbitration agreement."

During the pendency of the appeal the carriers, in accordance with the award and stipulation, complied with the $10 per month wage increase. On September 26, 1928, the mandate of the Circuit Court of Appeals affirming the decree of this Court was filed herein. On September 30, 1928, the carriers made payment to their employes for overtime, the amounts due being ascertained by the application of the following formula to each individual work record:

Memorandum as to application of (313 divisor) wage rates and method of computing back pay for Marine Firemen, Deckhands, Cabin Watchmen, and Night Watchmen, serving on 12-hour watch assignments, and who were accorded 48-hour week under Arbitration Award.

Monthly, Daily and Hourly Rates of Pay are as follows:

Classification	Monthly Rate	Daily (8-Hour) Rate	Hourly Overtime Rate
Passenger and Car Ferries and Tugs Towing Car Floats			
Fireman	$146.35	$5.6109	.7014¢
Deckhand	139.40	5.3444	.6681¢
Cabin Watchman	139.40	5.3444	.6681¢
Night Watchman	120.00	4.6006	.5751¢
Matron	85.00	3.2588	.4073¢

Employes who served on twelve (12) hour watch assignments, (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is, (except on

Fire Boats where there is no change) they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours.

It is concluded that the best way to arrive at the balance due any such individual, is to take the total number of eight (8) hour days, and the number of hours overtime served during a month, and multiply the same by the above enumerated daily and hourly rates, then allow as additional compensation, the difference between the total so obtained and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be reduced to a certain additional amount per day or hour, and so shown on the pay-roll for more complete record purposes.

Care should be exercised to see that credit is taken for back pay allowances on special payrolls for months [184] of March and April, 1928, the $10.00 per month wage increase allowed, being included on regular payroll commencing with May 1st.

Under above, individual back pay allowances for months of March, April, May, June, July and August, should be computed separately for each month, but all included on one payroll, that one paycheck may be issued to cover all that is due any employe. For month of

> March make additional allowance only in connection with watches that were commenced at midnight of Feb. 29th—March 1st, 1928, or thereafter. For August include on back payroll only watches commencing prior to midnight of Aug. 31st-Sept. 1st, 1928.
>
> Commencing with Sept. 1st, 1928, such employes involved should be compensated on the new (48-hour week) basis on regular payrolls. Hours of service assignments as provided for in Rule 6 and its exceptions as contained in the Arbitration Award, should be made effective as rapidly as practicable.

When the original proceedings were had, the Ferryboatmen's Union of California, to which had been theretofore assigned the claims of the individual employes, was an unincorporated association. On October 2, 1931, the union was incorporated as a nonprofit corporation under the laws of California, and on the same day, the union in its turn assigned to the corporation all of its rights and interest in said claims of the employes and in the judgment of this court, and the corporation now appears as the plaintiff herein seeking in equity the enforcement of the decree in the original proceeding; the suit against the Atchison, Topeka, Santa Fe Railway Company has been settled; the Western Pacific Railroad has, by stipulation of counsel, agreed to abide by the final decision herein; and the only defendants now

before the court are the Southern Pacific Company and the Northwestern Pacific Railroad Company.

Because the Railway Labor Act provides for an enforceable judgment, without specifying the procedure of enforcement, counsel thought it necessary for the protection of the rights of the union to file several pleadings, all involving the same subject matter and concerning which there could be, under the circumstances, but a single recovery. In the original proceeding, case 1955-S, there was filed a motion "that the Court make such other orders as will be [185] necessary or proper to carry into effect the judgment and decree heretofore entered herein", including a reference to a commissioner to ascertain the amounts due; also an ancillary bill to enforce the judgment; there were also filed separate bills in equity (Cases Nos. 3635-S and 3636-S) against each carrier for an accounting, etc. The three suits were consolidated, tried and submitted for decision as one case.

In addition to the foregoing statement the following facts are undisputed:

That the award changed Rule 2 of the 1925 working agreement by increasing the rate of pay as above specified, but the following language of the rule remained unchanged: "Note: Employes working broken assignments will be paid in following manner: (a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313. (b) On 12 and 24 watches,

allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365. * * Above applies to employes whose monthly assignment is broken as well as to relief employes and those in extra service."

That the award affirmed Rule 8 defining overtime, above quoted, and left unchanged Rule 9, relating to fixing overtime rate, as follows: "Rule 9. To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment. Note: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner: (a) On 8 and 16 watches, divide 12 times the monthly salary by 2504. (b) On 12 and 24 watches, divide 12 times the monthly salary by 2920."

That at all times herein, eight consecutive hours constituted a day's work. That under the 1925 agreement and until changed by the award assigned crews worked either on the basis of (a) twelve hours on watch, then twenty-four hours off watch, without pay for time off, or (b) eight hours or less [186] on watch for six consecutive days. That the award eliminated the twelve-hour watch, establishing hours of service as in Rule 6 above quoted.

That following the award, the carriers continued to assign crews under the former twelve-hour watch, paying the man at the increased monthly rate, but nothing for overtime; that under the 1925 agree-

ment a twelve-hour man was not entitled to overtime until he worked twelve hours on watch; that no time over twelve hours is involved herein.

That the purpose of the carriers' formula, above quoted, was to equalize the pay of the 12 and 24-hour men with the pay of the 8 and 16-hour men; that the straight-time rate and the overtime rate of the carriers are the same, and that under the formula the rate of compensation of the 12 and 24-hour men was exactly the same as that of the 8 and 16-hour men; that the rate of pay contended for by the union would give the 12 and 24-hour men eighteen per cent additional over the 8 and 16-hour men; that before the award, the 12-hour men worked more hours per month than the 8-hour men and their hourly earnings were less than the 8-hour men, an inequality of from 10 to 13 per cent against the 12-hour men, which caused dissatisfaction and led to the arbitration.

The heart of the present controversy is as to the correctness of the method used by the carriers in calculating the amounts due to the men for overtime. The union claims that the 12-hour men have not been paid for excess hourage under the award and judgment, which the carriers deny, asserting full payment.

The union contends that the 12-hour men were given regular assigned watches of 12 hours on and 24 hours off; that when the men worked the full watches assigned, they earned the monthly pay for

the straight time (the first 8 hours of each watch) and are entitled to additional pay [187] for the last 4 hours of each watch (overtime) at the 8-hour rate of 70.12 cents per hour; that the carriers made no attempt to segregate the 4 hours overtime from the 8 hours straight time, but by a "lumping process" added together the straight time and the overtime and by their formula figured out a new rate per hour; that the fundamental fallacy in the arithmetic of the carriers is in taking a daily rate of $5.6109 based on 313 days (the number of days in the year an 8-hour man works) when the men were assigned only 20 or 21 watches containing 245 instead of 313 working days. "You have the rule," said counsel for the union in his argument, "which states that the monthly salary covers the assigned time; that 8 hours shall be the basis of a day's labor, and that 8 hours or less each day for six consecutive days shall constitute the straight time and providing that, in addition, overtime shall be due for all time in excess of the eight hours. Now, any system of calculation, therefore, which consists simply of adjusting at a higher rate of pay to make the wages agree to what the 8-hour man had gotten, ignores completely the fundamental element of the contract, that so far as the straight time or first eight hours of the time is concerned, the men are entitled to a monthly salary so long as they work all of the time to which the company assigned them."

The carriers contend that when the Board amended the award it provided only one class for assigned crews working on the basis of 8 hours or less on watch each day for 6 consecutive days; that either these 12-hour men were working on broken watches or they were working on an assignment which was not provided for by the award; that the award abolished the assigned 12-hour watch but provided in exception five: (5) "On boats operating out of Vallejo Junction crews may be assigned 12 hours per day and not to exceed 48 hours per week," and in exception seven (7) for tugs towing car floats and car ferries crews may be assigned 12 hours [188] on watch with 24 hours off watch, provided such assigned watches average 48 hours per week, and in exception eight (8) on fire boats crews will work 24 hours on and 24 hours off, without pay for time off, and in exception twelve (12) night watchmen may be assigned on 12-hour watches four days per week.

"When you take the amendment to Rule 6 and the remodeling of the exceptions," said counsel for the carriers in argument, "you will find what the award imported into this ferryboat situation was a 48-hour week. Rule 2 was unchanged, except to increase the pay by $10 per month, but the note to Rule 2 is very significant: 'Employes working broken assignments will be paid in the following manner: (a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly

salary, divided by 313. Above applies to employes whose monthly assignment is broken, as well as to relief employes and those in extra service.' Rule 9 for the computation of the overtime rate is not changed. The Ferryboatmen's Union asked for punitive overtime, time and a half, and the Board of Arbitration let the time remain as straight time for overtime. So in paying a man it makes no difference whether you pay him a day's wages for 8 hours and 4 hours overtime; he gets the same amount. * * * There are two distinct classes of claims in this case. There are, first, these 12 and 24-hour men who did not work all of the assigned watches in the month; that is the 20 or 21 12-hour watches in the month, and then those men who I will call broken assignment men. * * * Over 25 per cent. of the claims are for broken assignments. Those claims are obviously not payable on the basis of a full month's pay. * * * They are to be adjusted Under Rule 2."

It is further urged that before the award the 8-hour men were getting 10 to 13 per cent. more pay than the 12-hour men, and that one of the principal objects of the arbitration was to equalize the pay between these two classes; that by the September adjustment the 12-hour men got "all together" [189] exactly what the 8-hour men were paid when they worked 8 hours straight time and 4 hours overtime.

The contentions of each side are best shown by the following diagrams based on the evidence:

12-24 FIREMEN—RATES OF PAY. MARCH 1-AUGUST 31, 1928.

Showing rates originally paid and rates used in adjustment of September, 1928.

Firemen worked all 12-24 watches in a calendar month.

COLUMN A	COLUMN B
Rate paid before Sept. adjustment	Rates used in Sept. adjustment
The monthly rate for Fireman was........$146.35 The firemen had been paid that amount before the Sept. Adjustment for a month's work of 20 or 21, 12-hour watches.	21 watches 21 12-hr. watches= 31½ 8-hr. days. 31½ 8-hr. dys. x $5.6109=$176.74 Less amount of monthly salary already paid........ 146.35 Adjustment check........$ 30.39
	20 watches 20 12-hr. watches= 30 8-hr. dys. 30 8-hr. dys. x $5.6109= $168.33 Less amount of monthly salary already paid........ 146.35 Adjustment check........$ 21.98

CONRAD ANDERSON—Fireman—on a 12-24 hour assignment. No. 2 on Plaintiff's Exhibit 8a.—21 watch assignment.
Worked only one 12-hour watch in August, 1928.

It is agreed that a fireman's daily rate for an 8-hour day is $5.6109.

It is agreed that a fireman's hourly rate for an 8-hour day is $ .7014.

Anderson was originally paid 1½ 8-hr. days at the 12-24 daily 8-hr. rate of $4.6460 .... $6.97

On the adjustment he was allowed 1½ 8-hrs. days at the 8-16 hour daily rate of $5.6109= $8.41, which gave him an additional check of 1.44

He was paid in all for 12 hours work........ $8.41

This was 12 hrs. at .7014, or 1 day at $5.6109, plus 4 hours overtime at .7014 per hr.

The plaintiff's formula applied to an 8-16 hour fireman who had worked 12 hours on one watch would give him

1 8-hr. day	$5.6109
4 hours overtime at .7014	2.80
	$8.41

But plaintiff now wants for Anderson:

12 hrs., 1½ 8-hr. dys. at the 12-24 rate, or........	$6.97
4 hrs. overtime at the 8-16 hr. rate of 70.14¢	2.80
	$9.77
Less	8.41
Plaintiff's demand	$1.36

[191]

EMPLOYEES WERE PAID FULL 8-16 HOUR RATES FOR DAYS AND HOURS WORKED.

Agreed daily rate for 8-16 hr. firemen—per day $5.6109
Agreed daily rate for 8-16 hr. firemen—per hour $ .7014

12-24 Fireman Leimar

	No. of 12-hr. watches	Paid Each Mo.	Paid Sept. '28	Total Paid
MARCH	11	$ 79.10	$13.48	
APRIL	1	7.32	1.10	
MAY	12	86.06	14.93	
JUNE	19	139.03	20.88	
JULY	19	139.03	20.88	
AUGUST	19	132.41	27.50	
	81	$582.95	$98.77	$681.72

81 12-hr. days=121½ 8-hr. days at $5.6109 = $681.72
81 12 hr. days=972 hours at .7014 = $681.72
81 12-hr. days=

81 8-hr. dys. at $5.6109 or $454.48
324 hours overtime at .7014 or 227.25 681.73

But Plaintiff claims $582.95
324 hrs. overtime 227.25 810.20
Less amount paid 681.72

Plaintiff's demand $128.48

[192]

EMPLOYEES WERE PAID FULL 8-16 HOUR RATES FOR DAYS AND HOURS WORKED.

Agreed daily rate for 8-16 hour fireman—per day $5.6109
Agreed daily rate for 8-16 hour fireman—per hour .7014

12-24 Fireman Costa

(Worked each 12 hours watch each month.)

	No. of 12-hr. watches	Paid Each Mo.	Paid Sept. '28	Total paid
MARCH	21	$146.35	$30.39	
APRIL	20	146.35	21.98	
MAY	21	146.35	30.39	
JUNE	20	146.35	21.98	
JULY	20	146.35	21.98	
AUGUST	21	146.35	30.39	
	123	$878.10	$157.11	$1,035.21

123 12-hr. days=184½ 8-hr. days at $5.6109 = 1,035.21
123 12-hr. days=1476 hours at .7014 = 1,035.21+
123 12-hr. days=
123 8-hr. days at $5.6109 or $690.14
492 hrs. overtime at .7014 or 345.08 = 1,035.22

But plaintiff claims
6 months at $146.35= $878.10
492 hours overtime at $ .7014= 345.08 = $1,223.18

Less amount paid........ 1,035.21

Plaintiff's demand .... $ 187.97

[193]

Upon consideration of all of the facts, circumstances and equities in the case, I am of the opinion that the adjusted compensation was fairly made and that in the September settlement the carriers paid their employes in full for all overtime.

Another important question, that of accord and satisfaction, is presented in the case. When the September adjustment was made the carriers issued counterprinted pay checks to each individual employe having a claim for overtime. These checks were in the usual form of pay-roll voucher issued in payment for services by the respective railroad companies, with additional words printed on the face of the checks as follows: On the check of the Southern Pacific Company, immediately following the statement of the sum for which payment was made, were printed these words and figures: "FOR ADDITIONAL COMPENSATION ACCOUNT arbitration award between So. Pac. Co. and Ferry Boatmen's Union, Oct. 21, 1927. For March to August, 1928, inclusive." On the check of the Northwestern Pacific Railroad Company were printed these words and figures: "Balance due for period Mar. 1 '28 to Aug. 31 '28 account wage adjustments." And on the reverse side of each check above the signature of the payee, appeared the following words: "Endorse here. This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within."

The judgment directed the carriers to put the wages and rules of the award into effect and cause all of said employes to be paid all back pay retroactively or otherwise due to them in accordance with the award. The judgment was in no sense a requirement to pay a liquidated demand, but necessitated an interpretation of the award. The judgment was not one for which the union could enter satisfaction of record, as the individual employes, the 12-hour men, were the actual creditors of the company. [194]

Before the checks were delivered to the employes, the business manager of the union told an official of the carriers "that for each 12-hour watch worked the men were entitled to 4 hours overtime." The official for the carriers said "the company would pay the men what was due them under the award." The official further said in explanation that the checks were issued in the special form above described as he understood the men "contemplated making some technical claims." The carriers construed the award and paid the men the amounts considered due to them, using the form of check above described. Payment was accepted by the men, the check clearly indicating what it was for, and the payees signed "acknowledgment of receipt in full."

From all of the facts and circumstances shown by the evidence, I think it may be inferred that there was a dispute concerning the amount due and that payment was accepted in full satisfaction thereof.

The checks were dated September 30, 1928. On January 9, 1929, counsel for the union made written demand upon the carriers for payment of additional overtime as contended for herein. On October 2, 1931, the employes assigned to the union all claims due them from the carriers, expressly including the claims for wages "from March 1, 1928, to and including December 1, 1928," and all rights which assignors had by reason of the judgment of this Court entered on September 29, 1928. It was not until September 27, 1933, that these proceedings were commenced, two days short of five years after entry of judgment, a delay suggestive of laches.

It seems to me that the facts and circumstances are sufficient to sustain the plea of the carriers of an accord and satisfaction. [195]

Defendants will submit findings of fact and conclusions of law (under Rule 42) in accordance with the views herein expressed.

April 4, 1935.

(Endorsed): Filed Apr 4 1935 [196]

In the Southern Division of the United States District Court for the Northern District of California

Equity No. 1955-S

In the Matter of an Award filed herein October 31, 1927, pursuant to an arbitration held under the act of Congress known as the Railway Labor Act, between The Atchison, Topeka and Santa Fe Railway Company, Northwestern Pacific Railroad Company, Southern Pacific Company and The Western Pacific Railroad Company, as parties of the first part, and certain employes thereof, represented by The Ferryboatmen's Union of California, as the party of the second part.

FIRST PARTIES, Petitioners,

vs.

SECOND PARTY, Respondent.

Equity No. 3635-S

FERRYBOATMEN'S UNION OF CALIFORNIA, a non-profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association, and C. W. DEAL (as the business manager and executive officer of said Union) suing on behalf of himself and all persons interested in the subject matter of this bill in equity. Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

Equity No. 3636-S

FERRYBOATMEN'S UNION OF CALIFORNIA, a non-profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association, and C. W. DEAL (as the business manager and executive officer of said Union) suing on behalf of himself and the other members of said Union and all persons interested in the subject matter of this bill in equity,

Plaintiffs,

vs.

THE NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

PLAINTIFFS' REASONS FOR NOT APPROVING PROPOSED FINDINGS AND CONCLUSIONS AND PROPOSED MODIFICATIONS, AMENDMENTS AND ADDITIONS.

The plaintiffs herein do not approve of the proposed findings of fact and conclusions of law in the form and with the [197] allegations as prepared by defendants herein, and, in accordance with Rules 22 and 42 of this Court, note their objections and suggestions herein.

1. There should be a ruling on plaintiffs' motion in Case No. 1955-S for an appropriate order to carry into effect the judgment and decree theretofore rendered therein.

2. Any such ruling should state that it is made nunc pro tunc as of September 25, 1933. This is in

accordance with stipulation of the parties appearing on Page 4 of the Record.

3. That part of Paragraph 6 of the conclusions of law commencing at the bottom of Page 17 providing that "defendants have and recover their costs herein" should be deleted. The opinion of the Court pursuant to which defendants prepared findings did not provide for costs and the Court's action in omitting to give defendants costs is proper as in an equity case the Court has discretion to allow or not to allow costs as the circumstances of the case may make just and equitable. In this case working men, in good faith, under legal advice, are attempting to obtain wages claimed to be due them for working 12-hour watches contrary to agreement and they should not be taxed with costs in the light of the Court's power not to penalize them for seeking claimed wages.

4. Plaintiffs object and except to the various statements in the proposed findings and conclusions that the employes were "fully paid" and, in particular, the proposed finding XVI stating that the defendants "did * * * fully pay" to each employe all sums of money due him.

(These findings are, however, in accordance with the opinion of the Court.)

Plaintiffs also object and except to the failure of the Court and the findings to set forth or allege the facts upon which is based the conclusion of full payment and propose that the findings be amended to set forth the facts upon which the Court [198] relies in making such conclusions and finding.

5. Plaintiffs object and except to the statement of proposed finding XVIII (commencing on Page 15) that the employes' demand "necessitated an interpretation of the award." If so, the parts of the award involved should be specified and the alleged controversy of the parties in reference thereto set out as a specific finding.

6. Plaintiffs object and except to the finding that the union could not satisfy the judgment obtained by it herein in its favor.

7. Lines 12-14 of proposed finding XVIII (Page 16) purport to state that the official for the carriers "further said in explanation" a special form of check was used because he understood the men contemplated making some technical claim.

The record is undisputed that no such statement was ever communicated to any employe or any union representative. The official representing the carriers repeatedly stated that he never discussed the matter with the union (R. p.) and, therefore, he could not have communicated any such statement to the union. The findings read as if such a communication took place in the course of conversation with a representative of the union.

Hancock expressly stated that he did not tell the men why he issued the checks in the form they were actually issued (R. p. 87).

8. Plaintiffs object and except to said statement in its present form and ask that the findings be amended to conform to the undisputed record to show that no such statement was ever communicated to the union or to any employe.

The official for the carriers did testify that the checks were used because of such claim but did not testify that he ever told anyone of his reasons.

9. In connection with the same findings plaintiffs object to the omission of the following further statement of said official which [199] appears in the record without dispute and asks that the finding be modified to include the following (T. p. 58): "Said official of the carriers told the said business manager of the union 'We will pay the men what we think they are entitled to, what the award says they should be paid, and if there is anything wrong we will take it up afterwards, as we have done in the past' ". There is no contradiction of Deal's testimony that in his conference with Hancock "there was no difference of opinion". (T. p. 43)

10. Proposed finding XIX should state the undisputed fact that neither the amounts due the men nor the method of computing the same was ever discussed by any official representing the carriers, with the men, or their representative. Hancock's testimony (T. pp. 76, 77) Hancock said he prepared the wage checks without any previous discussion with the union (T. pp. 77, 81) or its attorneys (T. p. 80).

11. Plaintiffs object and except to the finding that there was a "dispute concerning the amount due" in view of the uncontradicted evidence that the same was never discussed between the parties and likewise object and except to the finding that the checks were accepted "in full satisfaction" in view of the undisputed testimony that all wage checks under the union practice and custom of the carriers were to be cashed subject to correction there-

after. This finding is particularly necessary in view of Hancock's undisputed promise to correct them, as noted in objection 9 hereof.

12. There should be a finding that it was the uniform and regular practice of the carriers to correct and adjust all wage checks without exception and without objection regardless of the fact that they were endorsed as received in full.

13. There should be a finding that in attempting to secure the abolition of 12-hour watches the men claim that they were motivated by the desire to abolish a system which was deemed unsafe and [200] dangerous. (R. p. 175)

14. There should be a finding that the men during the period of controversy worked all the watches to which they were assigned by the carriers, and that none of the men were involved or asigned to 8-hour watches but were assigned to 12-hour watches by the carriers, and that they were to be paid a monthly wage for all assigned watches.

15. There should be a finding as to the number or hours in excess of eight worked by each man so that the court on appeal will be in a position to enter a final decree in the event of reversal on appeal.

Respectfully submitted,

DERBY, SHARP, QUINBY & TWEEDT,

Attorneys for Plaintiffs.

[Endorsed] Due receipt of a copy of the within Reasons for not approving Findings etc. is hereby acknowledged this 8th day of June, 1935.

HENLEY C. BOOTH & A. A. JONES

Attys. for S. P. Co. & N. W. P. R. R. Co.

Lodged June 8, 1935. [201]

[Title of Court and Cause—Nos. 1955, 3635-S and 3636-S.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I.

The above entitled cases are the outgrowth of an award [202] filed with the Clerk of this Court on October 31, 1927, pursuant to an arbitration held under the Act of Congress known as the Railway Labor Act. (44 Stat. p. 577; 45 USCA Sec. 151, et seq.)

The present controversy is between defendant railroads and the assignee of their employes. An accounting and additional back pay is sought for what plaintiff claims to have been overtime work performed during a six-months' period from March 1, 1928, to September 1, 1928, and not paid for. The railroads claim that these employes were fully paid for that period.

In 1925, the Atchison, Topeka & Santa Fe Railway, Northwestern Pacific Railroad Company, Southern Pacific Company and the Western Pacific Railroad (hereinafter called the carriers), had separate agreements covering "hours of service, working conditions and rates of pay" with their employes classified as marine firemen, deckhands, cabin watchmen, night watchmen, and matrons (hereinafter called the union), "employed on passenger, car and automobile ferries, tugs towing car floats and fire

boats" operated by the carriers on San Francisco Bay.

II.

On January 7, 1927, the carriers entered into an agreement with the union under said Railway Labor Act to submit to arbitration certain demands of employes for increases in pay and changes in working conditions. A copy of the agreement is attached to defendant's answer in each case, and marked Exhibit "B". The agreement provided: "The specific questions to be submitted to the Board for decision are whether or not there shall be any increase in the wages or changes in working Rules Nos. 6 and 8 of the employes of these railroads. * * *"

Rule 6 then read: "Assigned crews, except as hereinafter provided, will work either on basis of: (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time [203] off, or (b) Eight (8) hours or less on watch each day for six (6) consecutive days." Then follows a list of "exceptions", some of which will be referred to later.

Rule 8 then read: "The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro-rata rate."

The specific questions submitted under Rule 6 were: "(a) Shall the rule remain as written, or (b) shall the portion of the rule down to the word 'ex-

ceptions' be changed so as to read: 'Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days'."

The specific questions submitted under "Rule 8—Overtime" were: "(a) Shall the present rule providing for pro-rata rates of pay for overtime remain in effect, or (b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?"

In its award, a copy of which is attached to Plaintiffs' Bill in each case as Exhibit "A", the board increased wages $10 per month, fixing the rates of pay as follows:

Passenger and car ferries, and tugs towing car floats:

Firemen	$146.35	per month
Deckhands	139.40	" "
Cabin Watchmen	139.40	" "
Night Watchmen	120.00	" "
Matrons	85.00	" "

Fire Boats:

Firemen	97.57	" "
Deckhands	92.94	" "

The award changed Rule 6 to read as follows: "Rule 6. Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days." [204]

The award affirmed Rule 8, above quoted.

Petition for impeachment of the award filed by the carriers was dismissed by this Court and the award confirmed. Upon appeal, the decision of this Court was affirmed by the Circuit Court of Appeals on August 20, 1928. Atchison, T. & S. F. Ry. Co., et al., v. Ferryboatmen's Union of Cal. 28 F. (2) 26.

On May 19, 1928, pending the appeal from decision of this Court to the Circuit Court of Appeals, the carriers and the union entered into a stipulation, the pertinent part of which reads as follows:

> "1. That the ten dollars ($10.00) per month increase made by said award is to be put into effect and paid beginning May 1, 1928, and is to remain in effect until April 1, 1929, and thereafter subject to the 30-day provision in the existing contracts between the Ferryboatmen's Union of California and the respective carriers, copies of which contracts are exhibits in this case and are on file in the records of this Court.
>
> "2. That the $10.00 per month increase is to be retroactively paid to January 1, 1927; payment of such retroactive increase is to be made to the employees in service during all or any part of the period from and including January 1, 1927, to and including April 30, 1928, as early as practicable and not later than June 15, 1928.
>
> "3. That if the above entitled Circuit Court of Appeals affirms the decree confirming the

award the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927, to March 1, 1928.

"4. On the coming down of the remittitur or mandate from the Circuit Court of Appeals to the District Court the judgment of the District Court shall incorporate and confirm the terms of this stipulation irrespective of whether said Circuit Court of Appeals affirms or reverses the judgment and order of the District Court heretofore rendered herein."

After affirmance by the Circuit Court of Appeals, this court, on September 29, 1928, entered a judgment incorporating the award and said stipulation.

III.

A copy of the judgment, which embodies said stipulation [205] as well as the award of the Arbitration Board, is set forth in full as Exhibit "A" in Plaintiffs' Bills in each suit, and is incorporated by reference in the answers of defendants, Southern Pacific Company and Northwestern Pacific Railroad Company, in each case.

Copies of the agreements of 1925 between the employees represented by their union, on the one hand, and defendants Southern Pacific Company and Northwestern Pacific Railroad Company, on the other, fixing wages and working conditions are set forth as Exhibit "A" in the answers of defendants in each case.

IV.

During the period from and including March 1, 1928, to September 1, 1928, the carriers, as appears by their answers, continued in employment in the same capacities certain of their employes "who had formerly and prior to said arbitration agreement been employed as so-called '12-hour men', and so continued them upon the same basis or hours of service and on the same regular assigned watches as they and all of the so-called 'former 12-hour men' had been employed prior to said arbitration agreement."

During the pendency of the appeal the carriers, in accordance with the award and stipulation, paid the $10 per month wage increase to all employes. On September 26, 1928, the mandate of the Circuit Court of Appeals affirming the decree of this court was filed herein.

V.

On September 30, 1928, the carriers made payment to their employes for overtime, the amounts so paid being ascertained by the application of the following formula to each individual work record:

> "Memorandum as to application of (313 divisor) wage rates and method of computing back pay for Marine Firemen, Deckhands, Cabin Watchmen, and Night Watchmen, serving on 12-hour watch assignments, and who were accorded 48-hour week under Arbitration Award. [206]

Monthly, Daily and Hourly Rates of Pay are as follows:

Classification	Monthly Rate	Daily (8-Hour) Rate	Hourly Overtime Rate
Passenger and Car Ferries and Tugs Towing Car Floats			
Fireman	$146.35	$5.6109	.7014¢
Deckhand	139.40	5.3444	.6681¢
Cabin Watchman	139.40	5.3444	.6681¢
Night Watchman	120.00	4.6006	.5751¢
Matron	85.00	3.2588	.4073¢

Employes who served on twelve (12) hour watch assignments, (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is, (except on Fire Boats where there is no change) they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours.

It is concluded that the best way to arrive at the balance due any such individual, is to take the total number of eight (8) hour days, and the number of hours overtime served during a month, and multiply the same by the above enumerated daily and hourly rates, then allow as additional compensation, the difference between the total so obtained and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be

reduced to a certain additional amount per day or hour, and so shown on the pay-roll for more complete record purposes.

Care should be exercised to see that credit is taken for back pay allowances on special payrolls for months of March and April, 1928, the $10.00 per month wage increase allowed, being included on regular payroll commencing with May 1st.

Under above, individual back pay allowances for months of March, April, May, June, July and August, should be computed separately for each month, but all included on one payroll, that one paycheck may be issued to cover all that is due any employe. For month of March make additional allowance only in connection with watches that were commenced at midnight of Feb. 29th—March 1st, 1928, or thereafter. For August include on back payroll only watches commencing prior to midnight of Aug. 31st-Sept. 1st, 1928.

Commencing with Sept. 1st, 1928, such employes involved should be compensated on the new (48-hour week) basis on regular payrolls. Hours of service assignments as provided for in Rule 6 and its exceptions as contained in the Arbitration Award, should be made effective as rapidly as practicable."

It is hereby found that the rates per hour and per day [207] contained in the foregoing formula were correctly computed and applied.

VI.

When the original proceedings were had, the Ferryboatmen's Union of California, to which had been theretofore assigned the claims of the individual employes, was an unincorporated association. On October 2, 1931, the union was incorporated as a non-profit corporation under the laws of California, and on the same day, the unincorporated union assigned to the corporation all of its rights and interest in said claims of the employes and in the judgment of this court, and the corporation now appears as the plaintiff herein seeking in equity an enforcement of the decree in the original proceeding; the suit against the Atchison, Topeka, Santa Fe Railway Company has been settled; the Western Pacific Railroad has, by stipulation of counsel, agreed to abide by the final decision herein. The only defendants now before the court are the Southern Pacific Company and the Northwestern Pacific Railroad Company.

VII.

The union filed three several pleadings, all involving the same subject matter and concerning which there could be under the circumstances, but a single recovery. In the original proceeding, Case 1955-S, there was filed a motion "that the Court make such other orders as will be necessary or proper to carry into effect the judgment and decree heretofore entered herein", including a reference to a commissioner to ascertain the amounts due. The union also filed, in Case 1955-S, an ancillary

bill to enforce the judgment and also filed separate bills in equity (Cases Nos. 3635-S and 3636-S) against each carrier for an accounting. In each suit or proceeding the same relief was sought and therefore the proceedings and suits above referred to were consolidated, tried and submitted for decision as one case. Motions that plaintiff elect its remedy were denied. [208]

VIII.

Defendants, in their several answers, affirmatively pleaded that a dispute, as defined under the provisions of the Railway Labor Act (U. S. Code Supp. II, Title 45, Sec. 151, et seq.) existed betwen them and their employes as to the meaning and application of the award and that this Court had no jurisdiction to entertain either or any of plaintiff's causes of action; the Court found and now finds it has jurisdiction of the parties and subject matter.

IX.

The evidence shows that the award changed Rule 2 of each 1925 working agreement by increasing the rate of pay as above specified, but the following language of the rule remained unchanged: "Note: Employes working broken assignments will be paid in following manner: (a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313. (b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly sal-

ary divided by 365. * * * Above applies to employes whose monthly assignment is broken as well as to relief employes and those in extra service."

The award affirmed Rule 8 defining overtime, above quoted, and left unchanged Rule 9, relating to fixing overtime rate, as follows: "Rule 9. To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment. Note: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner: (a) On 8 and 16 watches, divide 12 times the monthly salary by 2504. (b) On 12 and 24 watches, divide 12 times the monthly salary by 2920."

Under said award, eight consecutive hours constituted a day's work with certain exceptions not applicable to the [209] plaintiffs' assignors. Under the 1925 agreement and until changed by the award assigned crews worked either on the basis of (a) twelve hours on watch, then twenty-four hours off watch, without pay for time off, or (b) eight hours or less on watch for six consecutive days. The award eliminated the twelve-hour watch, establishing hours of service as in Rule 6 above quoted, with the exceptions above referred to.

Following the award, the carriers continued to assign certain crews and employes from March 1, 1928, to August 31, 1928, inclusive, under the former twelve-hour watch, paying the men at the increased

monthly rate, but nothing for overtime until the adjustment was made in September, 1928; under the 1925 agreement a twelve-hour man was not entitled to overtime until he worked twelve hours on watch; that no time over twelve hours on watch is involved here, all time over twelve hours on a single watch having been fully paid.

X.

The evidence shows the purpose of the carrier's formula, above quoted, was to equalize the pay of the 12 and 24-hour men who worked during the period March 1 to August 31, 1928, with the pay of the 8 and 16-hour men who worked during the same period; that the straight-time rate and the overtime rate of the carriers were and are the same; and that under the adjustment made by the formula, the hourly and daily rate of compensation of the 12 and 24-hour men was exactly the same as that of the 8 and 16-hour men. That the rate of pay here contended for by the union would give the 12 and 24-hour men a preference in pay of about eighteen per cent. per hour worked over the pay of the 8 and 16-hour men when both classes were working on regular assigned watches; that before the award, the 12-hour men worked more hours per month than the 8-hour men on regular assigned watches, and their hourly earnings were less than the 8-hour men, there being thereby created an [210] inequality of from 10 to 13 per cent. against

the 12-hour men because while the monthly pay of both classes on regular assigned watches was the same.

XI.

There are two distinct classes of claims involved herein. There are, first, the 12 and 24-hour men who did work all of the assigned watches in a month; that is, the 20 or 21 twelve-hour watches in the month, and, second, those men who worked less than the 20 or 21 twelve-hour watches and who are called broken assignment men. Over 25 per cent. of the claims are for broken assignments which were not payable on the basis of a full month's pay but adjustable under Rule 2, hereinbefore referred to. One of the principal objects of the arbitration was to equalize the pay between these two classes; that by the September adjustment plus what they had already received under said stipulation, the 12-hour men got exactly what the 8-hour men were paid when they worked 8 hours straight time and 4 hours overtime.

XII.

The evidence shows that firemen who worked all 12-24 watches in a calendar month were fully paid as illustrated by the following: [211]

12-24 FIREMEN—RATES OF PAY. MARCH 1-AUGUST 31, 1928.

Showing rates originally paid and rates used in adjustment of September, 1928.

Firemen who worked all 12-24 watches in a calendar month.

A	B
Rate paid before Sept. adjustment	Rates used in Sept. adjustment
The monthly rate for Firemen was.........$146.35 The firemen had been paid that amount before the Sept. Adjustment for a month's work of 20 or 21, 12-hour watches.	21 watches 21 12-hr. watches= 31½ 8-hr. days. 31½ 8-hr. dys. x $5.6109=$176.74 Less amount of monthly salary already paid.......... 146.35 Adjustment check..................$ 30.39
	20 watches 20 12-hr. watches= 30 8-hr. dys. 30 8-hr. dys. x $5.6109= $168.33 Less amount of monthly salary already paid.......... 146.35 Adjustment check..................$ 21.98

[212]

XIII.

The evidence shows that any one employe who worked only one 12-hour watch during any one month was fully paid as illustrated by the following specific case:

> CONRAD ANDERSON—Fireman—on a 12-24 hour assignment. No. 2 on Plaintiff's Exhibit 8a.—21 watch assignment.
> Worked only one 12-hour watch in August, 1928.

A fireman's daily rate for an 8-hour day is $5.6109.
A fireman's hourly rate for an 8-hour day is $ .7014.

Anderson was originally paid 1½ 8-hr. days at the 12-24 daily 8-hr. rate of $4.6460 .... $6.97
On the adjustment he was allowed 1½ 8-hrs. days at the 8-16 hour daily rate of $5.6109= $8.41, which gave him an additional check of $1.44

He was paid in all for 12 hours work $8.41
This was 12 hrs. at .7014, or 1 day at $5.6109, plus 4 hours overtime at .7014 per hr.

The plaintiff's formula applied to an 8-16 hour fireman who had worked 12 hours on one watch would give him

1 8-hr. day	$5.6109
4 hours overtime at .7014	2.80
	$8.41

But plaintiff now demands for Anderson:

12 hrs., 1½ 8-hr. dys. at the 12-24 rate, or	$6.97
4 hrs. overtime at the 8-16 hr. rate of 70.14¢	2.80
	$9.77
Less	8.41
Plaintiff's demand	$1.36

[213]

XIV.

The evidence shows that employes who worked on "broken assignments" were fully paid for the days and hours worked, as illustrated by the following specific case:

Daily rate for 8-16 hr. firemen—per day $5.6109
Daily rate for 8-16 hr. firemen—per hour $ .7014

12-24 hour Fireman Leimar

	No. of 12-hr. watches	Paid Each Mo.	Paid Sept. 1928	Total Paid
MARCH	11	$ 79.10	$13.48	
APRIL	1	7.32	1.10	
MAY	12	86.06	14.93	
JUNE	19	139.03	20.88	
JULY	19	139.03	20.88	
AUGUST	19	132.41	27.50	
	81	$582.95	$98.77	$681.72

81 12-hr. days=121½ 8-hr. days at $5.6109 = $681.72
81 12 hr. days=972 hours at .7014 = $681.72
81 12-hr. days=

81 8-hr. dys. at $5.6109 or $454.48
324 hours overtime at .7014 or 227.25 — 681.73

But Plaintiff claims $582.95
324 hrs. overtime 227.25 — 810.20
Less amount — 681.72

Plaintiff's demand — $128.48

[214]

XV.

The evidence shows that the employes were paid full 8-16 hour rates for days and hours worked, as well as overtime, as illustrated by the following specific case:

Daily rate for 8-16 hour fireman—per day	$5.6109
Daily rate for 8-16 hour fireman—per hour	.7014

12-24 Fireman Costa

(Worked each 12 hours watch each month.)

	No. of 12-hr. watches	Paid Each Mo.	Paid Sept. 1928	Total paid
MARCH	21	$146.35	$30.39	
APRIL	20	146.35	21.98	
MAY	21	146.35	30.39	
JUNE	20	146.35	21.98	
JULY	20	146.35	21.98	
AUGUST	21	146.35	30.39	
	123	$878.10	$157.11	$1,035.21

123 12-hr. days=184½ 8-hr. days at $5.6109 = 1,035.21
123 12-hr. days=1476 hours at .7014 = 1,035.21+
123 12-hr. days=
123 8-hr. days at $5.6109 or $690.14 =
492 hrs. overtime at .7014 or 345.08 =

1,035.22

But plaintiff claims
6 months at $146.35= $878.10
492 hours overtime at $ .7014= 345.08 = $1,223.18

Less amount paid 1,035.21

Plaintiff's demand .... $ 187.97

[215]

XVI.

It is hereby found that each defendant railroad did with respect to its employes who, as aforesaid, assigned their claims to said unincorporated union, fully pay to such employe by said September, 1928, adjustment all sums of money then due, owing or unpaid him under said award, stipulation or judgment and that each of the defendants has fully complied with said award, stipulation and judgment.

XVII.

The evidence shows that when said September, 1928, adjustment was made the carriers issued and delivered counterprinted pay checks to each individual employe having a claim for overtime. These checks were in the usual form of pay-roll voucher issued in payment for services by the respective railroad companies, with additional words printed on the face of the checks as follows: On each adjustment of the Southern Pacific Company, immediately following the statement of the sum for which payment was made, were printed these words and figures: "For additional compensation account arbitration award between So. Pac. Co. and Ferry Boatmen's Union, Oct. 21, 1927. For March to August, 1928, inclusive." On each adjustment check of the Northwestern Pacific Railroad Company were printed these words and figures: "Balance due for period Mar. 1, '28 to Aug. 31, '28 account wage adjustment." And on the reverse side of each of said checks issued to the employes of the two railroads above mentioned, and above the signature of the

payee, appeared the following words: "Endorse here. This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within."

XVIII.

The evidence shows that the judgment directed the carriers to put the wages and rules of the award into effect and cause all of said employes to be paid all back pay retroactively [216] or otherwise due to them in accordance with the award. The judgment was not a liquidated demand, but necessitated an interpretation of the award. The judgment was not one for which the union could enter satisfaction of record, as the individual employes were the actual judgment creditors of the company.

Before the checks were delivered to the employes, the business manager of the union and the representative of its members under the Railway Labor Act, stated to an official of the carriers "that for each 12-hour watch worked the men were entitled to 4 hours overtime." The official for the carriers said "the company would pay the men what was due them under the award." The official further said in explanation that the checks were issued in the special form above described as he understood the men "contempleted making some technical claims." The carriers construed the award and paid the men the amounts they considered due to the men, using the form of check above described. Payment was accepted by the men, the check clearly indicating what it was for, and the payee in each case signing acknowledgment of receipt in full.

XIX.

From all of the facts and circumstances shown by the evidence, it is hereby found that there was a dispute concerning the amount due and the payments represented by the aforementioned checks and that they were accepted in full satisfaction thereof; in each case the defendant carriers, in their answers, set forth the affirmative plea that by reason of the foregoing facts the employes released them from all claims and demands for or on account of having worked on 12-24 hour watches or more during the period March 1st to August 31st, 1928, both days inclusive. The facts and circumstances are sufficient to sustain the defense of the carriers of an accord and satisfaction and of a release. [217]

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing special findings of fact, and from the admissions in the pleadings, the Court now decides:

1. That the controversy between the plaintiff and each of the defendants is not one which is required by the Railway Labor Act of Congress, either as it originally stood or as it has since been amended, to be submitted to a reconvened Board of Arbitration;

2. That each controversy referred to in the foregoing conclusion of law is justiciable in this Court and that this Court has original jurisdiction of the parties and of the subject matter of each of said controversies;

3. That the circumstances of the receipt, endorsement and cashing of the vouchers referred to in the foregoing findings were such as to constitute an accord and satisfaction of each and all of the plaintiffs' demands against the defendants sued upon by by plaintiffs, and also a release of each and all of the said demands;

4. That by stipulation of plaintiff and defendant Western Pacific Railroad Company, the judgment of this Court in favor of defendant Southern Pacific Company and Northwestern Pacific Railroad Company shall be applicable to defendant Western Pacific Railroad Company;

5. That the terms of the award and judgment of this Court have been fully carried out and performed by defendants with respect to all time worked by plaintiffs' assignors and sued on or involved herein;

6. That defendants are, and each of them is, entitled to a judgment that plaintiff take nothing by any or all of its said actions, suits or proceedings and that defendants have and [218] recover their costs herein against plaintiff.

Let a judgment be entered accordingly.

Done in open court this 22nd day of July, 1935.

A. F. ST. SURE,
United States District Court Judge.

[Endorsed]: Receipt of copy. Service of the within Special Findings of Fact and Conclusions of Law is admitted this 24th day of April, 1935.

DERBY, SHARP, QUINBY & TWEEDT,
Attorneys for Plaintiffs and Petitioners.

Filed Jul. 22, 1935. [219]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 1955 In Equity

IN THE MATTER OF AN AWARD FILED HEREIN OCTOBER 31, 1927, pursuant to an arbitration held UNDER THE ACT OF CONGRESS known as the RAILWAY LABOR ACT, between the Atchison, Topeka and Santa Fe Railway Company, Northwestern Pacific Railroad Company, Southern Pacific Company, and The Western Pacific Railroad Company, as parties of the first part and certain employes thereof, represented by the Ferryboatmen's Union of California, as the party of the second part.

No.......................

FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association and C. W. DEAL (As the business manager and executive officer of said Union) suing on behalf of himself and the other members of said Union and all persons interested in the subject matter of this bill in equity, Plaintiffs,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY, corporations, Defendants.

FINAL DECREE

The issues arising in this cause upon the "Ancillary Bill to enforce Decree already rendered herein" and the answers thereto were consolidated for trial with Cause No. 3635-S, entitled "Ferryboatmen's Union of California, et al, v. Southern Pacific Company, a corporation," and with Cause No. 3636-S entitled "Ferryboatmen's Union of California, et al., v. Northwestern Pacific Railroad Company, a corporation," and came on to be heard and was heard and argued by counsel and submitted for decision and thereupon, upon consideration thereof, and the Court [220] having filed its Findings of Fact and Conclusions of Law herein, it was ordered, adjudged and decreed as follows, viz:

It is ordered, adjudged and decreed, in accordance with said Findings of Fact and Conclusions of Law herein, that plaintiffs take nothing herein by their Ancillary Bill herein referred to and that defendants Northwestern Pacific Railroad Company, Southern Pacific Company and Western Pacific Railroad Company, corporations, go hence without day, without costs, costs of said consolidated trial being taxable in said suits 3635-S and 3636-S.

A. F. ST. SURE,
Judge.

Dated: San Francisco, California, August 1, 1935.

[Endorsed]: Filed and Entered August 1, 1935. [221]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 3635-S In Equity

FERRYBOATMEN'S UNION OF CALIFORNIA, a non-profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association and C. W. DEAL (as the business manager and executive officer of said Union) suing on behalf of himself and all persons interested in the subject matter of this bill in equity.

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

FINAL DECREE

This cause was consolidated for trial with Cause No. 1955, entitled "Ferryboatmen's Union of California, Incorporated, etc. v. Southern Pacific Company, et al.," and with Cause No. 3636-S, entitled "Ferryboatmen's Union of California, incorporated v. Northwestern Pacific Railroad Company, a corporation," and came on to be heard, and was heard and argued by counsel, and submitted for decision and thereupon, upon consideration thereof, and the Court having made and filed its Findings of Fact

and Conclusions of Law in Case 1955, to which reference is hereby made, it was ordered, adjudged and decreed as follows, viz:

It is ordered, adjudged and decreed in accordance with its Findings of Fact and Conclusions of Law in Case 1955, that plaintiffs take nothing herein; that the said defendant Southern Pacific Company, a corporation, go hence without day, and that it recover from said plaintiffs, Ferryboatmen's Union of California, a non-profit corporation, and C. W. Deal, its costs herein expended, the same to be taxed by the Clerk of the Court, and for execution therefor. Costs taxed at $120.80.

A. F. ST. SURE,
Judge.

Dated: San Francisco, California, August 1st, 1935.

[Endorsed]: Filed and Entered Aug. 1, 1935.
[222]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 3636-S In Equity

FERRYBOATMEN'S UNION OF CALIFORNIA, a non profit corporation, FERRYBOATMEN'S UNION OF CALIFORNIA, an unincorporated association and C. W. DEAL (as the business manager and executive officer of said Union) suing on behalf of himself and all persons interested in the subject matter of this bill in equity,

Plaintiffs,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

FINAL DECREE

This cause was consolidated for trial with Cause No. 1955, entitled "Ferryboatmen's Union of California, Incorporated, etc., v. Southern Pacific Company, et al.," and with Cause No. 3635-S, entitled "Ferryboatmen's Union of California, Incorporated v. Southern Pacific Company, a corporation," and came on to be heard, and was heard and argued by counsel, and submitted for decision and thereupon, upon consideration thereof, and the Court having made and filed its Findings of Fact and Conclusions of Law in Case 1955 to which ref-

erence is hereby made, it was ordered, adjudged and decreed as follows, viz:

It is ordered, adjudged and decreed, in accordance with its Findings of Fact and Conclusions of Law in Case 1955, that plaintiffs take nothing herein; that the said defendant Northwestern Pacific Railroad Company, a corporation, go hence without day, and that it recover from the said plaintiffs, Ferryboatmen's Union of California, a non-profit corporation, and C. W. Deal, its costs herein expended, the same to be taxed by the Clerk of the Court, and for execution therefor. Costs taxed at $120.80.

A. F. ST. SURE,
Judge.

Dated: San Francisco, California, August 1, 1935.

[Endorsed]: Filed and Entered August 1, 1935. [223]

[Title Court and Causes Nos. 1955-S, 3635-S, and 3636-S.]

ENGROSSED STATEMENT OF EVIDENCE FOR USE ON APPEAL UNDER EQUITY RULE No. 75. [224]

Proceedings before Honorable A. F. St. Sure, San Francisco, California, on September 13, 14, 24 and 25, 1934.

Present: Joseph C. Sharp Esq. of Messrs. Derby, Sharp, Quinby & Tweedt, on behalf of plaintiff.

Henley C. Booth Esq. and A. A. Jones Esq. on behalf of defendants.

STATEMENTS AND STIPULATIONS BY COUNSEL

MR. SHARP: There are three cases on the calendar this morning, your Honor, Nos. 1955, 3635 and 3636. I take it counsel will stipulate that all three cases may be consolidated and tried as one case.

MR. BOOTH: We reserve the right at the conclusion of the testimony to renew our motion that counsel elect as between the ancillary bill and the independent or original bill in equity.

THE COURT: You can renew your motion and I will make the same ruling denying the motion.

MR. BOOTH: Exception. It is obvious, for the convenience of every one concerned, as well as shortening the record, that all testimony offered or admitted be considered as being offered and admitted in each of the cases insofar as it may be relevant.

THE COURT: Yes.

MR. SHARP: That will be agreeable.

MR. SHARP: In the original action No. 1955 there is pending a motion for an appropriate order of the Court to enforce the judgment based upon the arbitration award and there is a stipulation that any order of the Court may be made nunc pro tunc as of September 25, 1933.

MR. BOOTH: That is agreed to. [225]

MR. SHARP: I will read into the record as evidence on plaintiff's behalf all of the allegations appearing in the answer of the Southern Pacific Company in case No. 3635, which are sub-paragraphs

(a), (b), (c), (d), (e), (f), (g) and (h) of defendant Southern Pacific Company's "Second, Further and Separate Defense"; and all of Paragraph I of said defense down to but not including the paragraph beginning: "This defendant prior to September 30, 1928, fully paid to each of such employes" . . . .

Similar allegations are in all of the pleadings of the defendants and the similar allegations in each pleading of the defendants are hereby offered in evidence.

MR. SHARP: To explain the rule, I have prepared an exhibit which I will place on the board and ask that it be marked for identification Plaintiff's Exhibit No. 1.

TESTIMONY OF CLYDE W. DEAL
for plaintiff

Clyde W. Deal, a witness called for the plaintiff, was duly sworn, examined and testified as follows:

I am the secretary and business manager of the Ferryboatmen's Union of California, plaintiff herein.

MR. SHARP: There is an agreement effective as of January 16, 1925, entered into between the Southern Pacific Company and the Ferryboatmen's Union of California. Said agreement was identified by the witness and duly offered and admitted in evidence as plaintiff's Exhibit No. 2. Said exhibit is not herein set forth in full because it is a copy of the

(Testimony of Clyde W. Deal.)
agreement between Southern Pacific Company and Ferryboatmen's Union of California, a copy of which is attached as Exhibit A to Southern Pacific Company's Answer in Case No. 3635-S.

The arbitration agreement referred to in the pleadings was identified by the witness and duly offered and admitted in evidence as plaintiff's Exhibit No. 3. Said exhibit is not herein repeated because a copy thereof is attached as Exhibit B to defendant Southern [226] Pacific Company's Answer in Case No. 3635-S.

The arbitration award referred to in the pleadings was identified by the witness and duly offered and admitted in evidence as plaintiff's Exhibit No. 4. Said Exhibit is not herein repeated because a copy of said arbitration award is included in the copy of the judgment in Case No. 1955, which is attached as an exhibit to plaintiffs' complaint in Case No. 3635-S.

MR. SHARP: For the convenience of the Court I have prepared a short exhibit showing Rule 6 as it existed before the arbitration award and have marked in red the matter deleted by the award. Thereupon the exhibit was marked plaintiff's Exhibit No. 5.

By stipulation of the parties there was duly offered and admitted in evidence as plaintiff's Exhibit No. 6 the stipulation made by the parties in May, 1928. Said stipulation is not repeated herein because the material portions thereof are included in the

(Testimony of Clyde W. Deal.)
Judgment in Case No. 1955, which Judgment is plaintiff's Exhibit No. 7 herein.

Next was offered and admitted in evidence by consent of counsel a copy of the judgment which was entered by this court on September 29, 1928, in cause numbered 1955, as plaintiff's Exhibit No. 7. Said Judgment is not repeated herein because a copy thereof is attached as an exhibit to plaintiffs' complaint in Case No. 3635-S.

MR. BOOTH: I would like to reserve my formal objection to that, on the ground that it goes partly to the merits of the case, that is, the judgment is objected to in so far as this contains a direction to the railroads or any of them, to pay any amount of money, or to pay money on any basis stated in the judgment. The point of the objection is that the Railway Labor Act does not confer power on the court in a petition to impeach an award, in passing on a pettion to impeach an award, to make any order or direction for the payment of money. Of course, that is involved in the merits of the case [227] and I merely want to preserve the point so that the judgment will not go in evidence.

The court overruled the objection; exception allowed.

The witness (Mr. Deal) stated that, after the judgment was entered, certain payments were made on account of the back pay referred to in the judgment. The amounts paid are set forth in two exhibits furnished to the witness by the carriers. Both exhibits

(Testimony of Clyde W. Deal.)
were duly offered and admitted in evidence as plaintiff's Exhibits 8-A and 8-B. Exhibit 8-A covers the men employed by the Southern Pacific Company and Exhibit 8-B the employees of the Northwestern Pacific Railroad Company.

PLAINTIFF'S EXHIBIT 8-A
was in words and figures as follows: [228]

(Testimony of Clyde W. Deal.)

PLAINTIFFS' EXHIBIT 8-B

was in words and figures as follows: [235]

EXHIBIT "C".

STATEMENT OF SERVICE PERFORMED AND WAGES PAID MARINE EMPLOYES

on 12 hour watches N. W. P. R. R. March 1st, 1928 to Aug. 31st, 1928

	Name of Employe		Amount Back Pay Check Sept. 29, 1928	March Wtchs.	March Amt. paid	April Wtchs.	April Amt. paid	May Wtchs.	May Amt. paid	June Wtchs.	June Amt. paid	July Wtchs.	July Amt. paid	August Wtchs.	August Amt. paid	Total of Columns 3 to 8		Total hours overtime in 6 month period	Amt. overtime paid on 12 hr. basis	Add'l amt. overtime paid 9/29/28	Total amount overtime paid
				Number of 12 hour watches and amount paid																	
	(1)		(2)	(3)		(4)		(5)		(6)		(7)		(8)		(9)		(10)	(11)	(12)	(13)
1	Adamson, G. S.	d	126.55	20	137.40	20	139.40	20	139.40	20	139.40	21	139.40	11	75.57	112	770.57				
2	Cordoza, M.	d	130.00	8	54.96	20	139.40	21	139.40	19	130.53	21	139.40	20	139.40	109	743.09				
3	Collins, M. J.	d	148.87	21	139.40	20	139.40	20	139.40	20	139.40	21	139.40	21	139.40	123	836.40	1/2	.29	.04	.33
4	Connor, Geo. M.	d	29.61					3	20.61	7	45.80	7	48.09	9	61.83	26	176.33	3-3/4	2.16	.35	2.51
5	Detels, Syd. A.	d	140.54	20	139.40	18	123.66	21	139.40	20	139.40	21	139.40	20	139.40	120	820.66				
6	Englund, Nels E.	d	148.87	21	139.40	20	139.40	20	139.40	20	139.40	21	139.40	21	139.40	123	836.40	1/2	.29	.04	.33
7	Helgesson, O. W.	d	140.82	20	139.40	20	139.40	21	139.40	20	139.40	21	139.40	20	139.40	122	836.40				
8	Hokanson, L.	d	148.83	21	139.40	20	139.40	21	139.40	20	139.40	20	139.40	21	139.40	123	836.40				
9	Hunt, W. F. (Prehenko, W.)	d	133.11	17	116.79	18	123.66	21	139.40	20	139.40	20	137.40	20	139.40	116	796.05				
10	Joaquin, M.	d	140.82	20	139.40	20	139.40	21	139.40	20	139.40	21	139.40	20	139.40	122	836.40				
11	Johnson, Alf	d	135.70	20	139.40	19	130.53	21	139.40	13	89.31	21	139.40	20	139.40	114	777.44				
12	Knudsen, S.	d	133.77	20	139.40	20	139.40	21	139.40	17	116.79	20	137.40	20	139.40	118	811.79	4	2.30	.38	2.68
13	Lindekrans, Fred	d	148.83	21	139.40	20	139.40	21	139.40	20	139.40	20	139.40	21	139.40	123	836.40				
14	Mattos, A.	d	101.19	8	54.96	17	116.79	2	13.74	20	139.40	20	139.40	21	139.40	88	603.69				
15	Mowrey, O. R.	d	141.72	21	139.40	20	139.40	20	139.40	20	139.40	19	130.53	21	139.40	121	827.53	1/2	.29	.04	.33
16	Nealon, T.	d	147.17	21	139.40	19	130.53	16	109.92	20	139.40	21	139.40	21	139.40	118	798.05	1/2	.29	.04	.33
17	Nelson, Emil	d	148.55	21	139.40	20	139.40	21	139.40	18	123.66	20	139.40	21	139.40	121	820.66				
18	Stone, A. J. (Oushanoff, A.	d	144.54	21	139.40	20	139.40	21	139.40	19	130.53	19	130.53	20	137.40	120	816.66				
19	Stamatoff, N.	d	124.89	20	139.40	20	139.40	20	137.40	20	139.40	16	109.92	20	139.40	116	804.92	6-11/12	3.98	.65	4.63
20	Taylor, Pete	d	77.83	21	139.40	19	130.53	13	89.31					11	75.57	64	434.81				
21	Weimann, Geo.	d	143.02	21	139.40	18	123.66	21	139.40	18	123.66	19	130.53	19	130.53	116	787.18	11	6.33	1.04	7.37
22	Olivera, S. N.	d	136.84	20	137.40	20	139.40	21	139.40	20	139.40	20	139.40	20	137.40	121	832.40				
23	Creighton, W. J., Jr	f	131.86	20	146.35	8	57.72	21	151.51	20	146.35	19	137.08	21	146.35	109	785.36				
24	Heruhin, Wm.	f	88.85	13	93.79	9	64.93	10	72.15	14	101.01	15	108.22	13	93.79	74	533.89	1/2	.30	.05	.35
25	Hoag, Leonard	f	114.35	9	64.93	20	146.35	13	93.79	17	122.65	20	144.30	18	129.87	97	701.89				
26	Jacobi, Otto	f	138.22	21	146.35	9	64.93	19	137.08	20	146.35	21	146.35	20	146.35	110	787.41				
27	Jukich, F., Jr	f	139.44	20	146.35	9	64.93	20	146.35	19	137.08	21	146.35	21	146.35	110	787.41	12-5/12	7.38	1.22	8.60
28	Lucas, Alfred*	f																			
29	Shine, Thomas	f	121.13	13	93.79	20	146.35	20	146.35	20	146.35	20	144.30	12	86.58	105	763.72	12-5/6	7.73	1.08	8.81
30	Taylor, N. D.	f	148.52	20	146.35	20	146.35	21	146.35	20	146.35	21	146.35	20	146.35	122	878.10				
31	Hallett, A. F.	w	117.59	23	136.27	§23	135.79	§18	101.78	§21	111.41	§24	124.38	§20	103.25	129	712.88				
32	Jones, N. L.	cw	129.66	20	139.40	20	139.40	19	130.53	20	139.40	20	137.40	20	137.40	119	823.53				
			4001.66													3411	23414.42	53-2/3	31.34	4.93	36.27

* Did not work on any 12 hour watches

§ Paid on basis on actual time worked. Exception 12 of Rule 6 of Award

Did not work full 12 hour watches

(Testimony of Clyde W. Deal.)

The witness stated that these exhibits give the names of the employes, the amount of the back pay check paid by the carrier and shows the number of 12-hour watches worked during the period March to August, 1928. The witness then identified statements as to how the two exhibits had been prepared. By consent of counsel these statements were offered and admitted in evidence as plaintiff's Exhibits 9-A and 9-B. The said

EXHIBIT 9-A

was in words and figures as follows: [237]

Column headed (1) shows the names of those men who are claimed by plaintiff to have been employed by this defendant on said 12-24 hour watches during the six-month period, March to August, 1928, both months inclusive, and whose claims for what plaintiff terms "overtime" are held by plaintiff and herein sued upon. Where an amount is not shown in the Column headed (2) following an alleged employe's name it indicates that, for the reasons therein stated, said alleged employe did not at any time during said six months period work on said 12-24 hour watches which are the subject of plaintiff's claim. Where an amount is shown in said Column headed (2) opposite a name in Column headed (1) it shows that the employe named actually worked during said six months period or a portion thereon on the basis of said 12-24 hour watches and not within any exception contained in Rule 6 of said Agreement "Ex-

(Testimony of Clyde W. Deal.)

hibit A" hereto or in said Rule 6 as amended by said Award. The capacity in which each employe worked —whether as fireman, deckhand, cabin watchman or night watchman—is shown by appropriate headings and designations.

Column headed (2) shows in dollars and cents the amount actually paid each employe by this defendant by a pay voucher dated September 30, 1928 and cashed by him and the amount thereof received by him during October, 1928.

Said amount in Column headed (2) includes two items; (a) the amount of additional compensation paid said employe arrived at in the manner hereinafter described, and (b) the amount paid said employe for overtime worked more than 12 hours in any one watch during said six months period in addition to the amount theretofore paid said employe for such overtime arrived at as hereinafter explained. The hours represented by said (b) are [238] referred to herein as "overtime"; the hours represented by said "a" are not herein referred to as "overtime."

By "twelve hour watch" is meant that whether one of said 12 hour men worked 11 hours and 40 minutes or 12 hours and 20 minutes on a watch or assignment on duty, each watch was by consent of said employe treated as a 12 hour watch, as in actual operation such watches balance to a 12 hour average in a cycle of three weeks.

(Testimony of Clyde W. Deal.)

The table or wage base used in calculating said amounts (a) and (b) was as follows:

TABLE "WA"

Class	Monthly Rate	Daily Rate	Hourly Rate
Fireman	$146.35	$5.6109	$0.7014
Deckhand	139.40	5.3444	0.6681
Cabin Watchman	139.40	5.3444	0.6681
Night Watchman	120.00	4.6006	0.5751

Said daily rate was ascertained by dividing twelve times the monthly rate by 313—the number of working days per year on an 8-16 hour assignment; said hourly rate was taken as one-eighth (1/8) of the said daily rate.

Amount (a) was arrived at by taking the number of hours (not exceeding 12 in any one watch) worked by the employe in any one calendar month or portion thereof and dividing that total by eight (8) to ascertain the equivalent number of eight hour days (or fraction of one day) worked by the employe during that month or period; that number of days(and fractional day if any) was then multiplied by the daily rate as shown by the above Table "WA". From that result so obtained there was deducted the amount theretofore paid the employe for services during that calendar month or part month (exclusive of the amount paid for overtime over a twelve hour watch) at the monthly or daily rate

(Testimony of Clyde W. Deal.)

specified in the [239] foregoing Table "WA" and the remainder was allowed as additional compensation as said amount (a).

Overtime over a 12 hour watch was separately computed upon the hourly rate shown in said Table "WA"; from the result was deducted the amount previously paid on account of the same overtime, the remainder being allowed as said amount (b).

The deduction was necessary because the hours of overtime over 12 hour watches actually worked during said six months by said 12-24 hour employes had been paid for from time to time during said six months at rates per hour less than the hourly rates shown in the foregoing Table "WA". Said lesser rates per hour were as follows:

Overtime rates per hour actually paid 12-24 hour men for overtime over 12 hours on watch, March 1-August 31, 1928, inclusive, and paid prior to September 15, 1928.

Class	Per Hour*
Firemen	$.6014
Deckhands	$.5728
Cabin Watchmen	$.5728
Watchmen	$.4932

*The hourly rates shown next above were ascertained by multiplying the monthly rate (as fixed by said award) by 12 and dividing the result by 2920 hours—365, eight hour days—and may be referred to as "12-24 hour overtime rates."

(Testimony of Clyde W. Deal.)

FURTHER DETAILS

The details of said calculations which resulted in the amounts shown in said column headed (2) are further shown in succeeding columns as follows:

In columns headed, respectively, (3), (4), (5), (6), (7) and (8) are shown, respectively, for the calendar months of March, April, May, June, July and August, 1928, as to each employe the number of twelve hour watches he worked that calendar month [240] and the amount in dollars and cents he was paid therefor by this defendant (exclusive of payment for overtime above twelve hours in any one watch) prior to September 30, 1928, and not included in the amount shown in said column headed (2).

In Column headed (9) is shown as to each employe the total of the amounts shown in Columns (3) to (8), inclusive.

The amounts respectively shown in said monthly columns (3) to (8) inclusive were arrived at in the following manner:

When one of said employes worked in a calendar month all of the 12 hour watches that would be produced by a continuous 12-24 hour assignment during that month he received his monthly pay at the rate specified by said award as applicable to his occupation and shown in the first column of the foregoing table headed Table "WA".

Where an employe worked in any one calendar month a less number of 12 hour watches than en-

(Testimony of Clyde W. Deal.)
titled him to a month's pay on the basis prescribed by said award and shown in the foregoing Table "WA" he was paid—during said six months—for that calendar month on the basis of a daily rate of pay on an eight hour basis; that is to say—one and one-half days pay for each 12 hour watch at a daily rate arrived at by taking the number of 12 hour watches for each calendar month in the watch assignment on which the man worked, then adding one-half thereof to arrive at the number of representative or constructive eight hour days, then dividing that result into the monthly rate of pay fixed by the award.

For example: The daily rate of pay for Conrad Anderson, fireman, shown as No. 2 fireman on Exhibit C was for the month of May, 1928, arrived at by taking his full monthly assignment [241] on his watch as 20 watches. The resulting formula was 20 plus 10 = 30; $146.35 = $4.8783 per 8 hours.

———

30

During that month of May Conrad Anderson worked 18 watches of 12 hours each and was paid 18 plus 9 = 27, × $4.8783 = $131.72 which had been paid him for that month prior to the computation which resulted in the pay voucher of September 30, 1928.

(Testimony of Clyde W. Deal.)

DETAIL OF EXHIBIT C AS TO OVERTIME

Some of the said employes who worked in said 12-24 hour watches during said six month occasionally worked more than 12 hours on one watch which overtime has been paid for as hereinbefore described.

Column headed (10) shows the total number of hours of such overtime worked by each employe during said six months period.

Column headed (11) shows the amounts paid during said six months on said 12 hour hourly basis.

Column headed (12) shows additional amount paid for overtime and included in the pay voucher of September 30, 1928.

Column headed (13) shows total amount paid for overtime during said six months period.

By deducting from the amount in Column headed (2) the amount shown in Column headed (12) the result will be the amount paid by said pay voucher of September 30, 1928 for additional compensation for the watches shown in Columns (3) to (8) inclusive.

In the result of all multiplication of hours or days by a rate, hereinbefore referred to, fractions of a cent were treated as a cent only when they equalled or exceeded one-half cent. [242]

(Testimony of Clyde W. Deal.)

SAID EXHIBIT 9-B

was in words and figures as follows:

Column headed (1) shows the names of those men who are claimed by plaintiff to have been employed by this defendant on said 12-24 hour watches during the six-month period, March to August, 1928, both months inclusive—and whose claims for what plaintiff terms "overtime" are held by plaintiff and herein sued upon. Where an amount is not shown in the Column headed (2) following an alleged employe's name it indicates that, for the reasons therein stated said alleged employe did not at any [243] time during said six months period work on said 12-24 hour watches, which are the subject of plaintiff's claim. Where an amount is shown in said column headed (2) opposite a name in column (1) it shows that the employe named (excepting night watchman A. F. Hallett) actually worked during said six months period or a portion thereon on the basis of said 12-24 hour watches, and—with the exception of night watchman Hallett—not within any exception contained in Rule 6 of said Agreement ("Exhibit A" hereto) or in said Rule 6 as amended by said Award. The capacity in which each employe worked—whether as fireman, deckhand, cabin watchman or watchman—is shown by appropriate headings and designations "F", "D", "CW" or "W".

Column headed (2) shows in dollars and cents the amount actually paid each employe by this defendant by a pay voucher dated September 29, 1928,

(Testimony of Clyde W. Deal.)
and cashed by him and the amount thereof received by him during October, 1928.

Said amount in Column headed (2) includes two items (a) the amount of additional compensation paid said employe arrived at in the manner hereinafter described, and (b) the amount paid said employe for overtime worked more than 12 hours in any one watch during said six months period in addition to the amount theretofore paid said employe for such overtime arrived at as hereinafter explained. The hours represented by said (b) are referred to herein as "overtime"; the hours represented by said (a) are not herein referred to as "overtime."

Upon the entry of the judgment (Exhibit "A" to the supplemental and amended complaint herein) this defendant calculated the additional amount due each employe who, during the six months period, March to August, 1928, inclusive, had worked for it as a fireman, deckhand or cabin watchman on the basis of 12 hours on watch, then 24 hours off watch and so on (and night watchmen on basis of one watch on for each consecutive night of three nights [244] then 36 hours off watch and so on); said additional amount was made up of two items (a) additional compensation for time not computed as overtime as hereinafter described as (b); and (b) additional amount due for time worked in excess of 12 hours on any watch and which additional amount is herein referred to as for "overtime". None of said 12-24 hour employes nor night watch-

(Testimony of Clyde W. Deal.)
men worked during said period less than 8 hours on any watch.

The amounts (a) and (b) were added together and resulted in an amount hereby termed (c) which is the same amount shown in the second column of Exhibit "C" hereto as the amount of the pay voucher prepared for the employe and date September 29, 1928, and the amount actually paid him thereon.

Said amount "c" was computed in addition to the rates of pay prescribed by Rule 2 of said award which said rates of pay were in each case of said 12-24 hour employes paid him by a separate and distinct pay voucher or vouchers for such time as he worked for this defendant from and after January 1, 1927, pursuant to the first and second paragraphs of the stipulation quoted in such judgment.

None of said employes (other than said night watchman) as to which said amounts "a" and "b" were computed worked on 12 hour watches under any of the exceptions in Rule 6 of said Award. Night watchmen worked under exception twelve (12) of Rule 6 except that he was assigned to work more than four twelve (12) hour watches four days per week.

By "twelve hour watch" is meant that whether one of said 12 hour men worked 11 hours and 40 minutes or 12 hour and 20 minutes on a watch or assignment on duty, each watch was by consent of said employe treated as a 12 hour watch, as in

(Testimony of Clyde W. Deal.)
actual operation such watches balance to a 12 hour average in a cycle of three weeks. [245]

The table or wage base used in calculating said amounts (a) and (b) was as follows:

TABLE "WA"

Class	Monthly Rate	Daily Rate	Hourly Rate
Fireman	$146.35	$5.61	$0.7025
Deckhand	139.40	5.34	0.67
Cabin Watchman	139.40	5.34	0.67
Night Watchman	120.00	4.60	0.5775

Said daily rate was ascertained by dividing twelve times the monthly rate by 313—the number of working days per year; said hourly rate was taken as one-eighth (1/8) of the said daily rate.

Amount "a" was arrived at by taking the number of hours (not exceeding 12 in any one watch) worked by the employe in any one calendar month or portion thereof and dividing that total by eight (8) to ascertain the equivalent number of eight hour days (or fraction of one day) worked by the employe during that month or period; that number of days (and fractional day if any was then multiplied by the daily rate as shown by the above table. From that result so obtained there was deducted the amount theretofore paid the employe for services during that calendar month or part month (exclusive of the amount paid for overtime over a twelve hour watch) on the monthly or daily rate

(Testimony of Clyde W. Deal.)
specified in the foregoing table and the balance was allowed as additional compensation as said amount (a).

Overtime over a 12 hour watch was separately computed upon the hourly rate shown in said table; from the result was deducted the amount previously paid on account of the same overtime, the remainder being allowed as said amount (b).

The deduction was necessary because the hours of overtime over 12 hour watches actually worked during said six months by [246] said 12-24 hour employes had been paid for from time to time during said six months at rates per hour less than the hourly rates shown in the foregoing table. Said lesser rates per hour were as follows:

Overtime rates per hour actually paid 12-24 hour men for overtime over 12 hours on watch, March 1-August 31, inclusive, and paid prior to September 15, 1928.

Class	Per Hour*
Firemen	$0.6025
Deckhands	0.5750
Cabin Watchmen	0.5750
Watchmen	0.4950

* The hourly rates shown next above were ascertained by multiplying the monthly rate (as fixed by said award by 12 and dividing the result by 2920 hours—365, eight hour days—and may be referred to as "12-24 hour overtime rates."

(Testimony of Clyde W. Deal.)

FURTHER DETAILS

The detail of said calculations which resulted in the amounts shown in said Column headed (2) are further shown in succeeding columns as follows:

In Columns headed, respectively, (3), (4), (5), (6), (7) and (8) are shown, respectively, for the calendar months of March, April, May, June, July and August, 1928, as to each employe the number of twelve-hour watches he worked that calendar month and the amount in dollars and cents he was paid therefor by this defendant (exclusive of payment for overtime above twelve hours in any one watch) prior to September 30, 1928 and not included in the amount shown in said Column headed (2).

In Column headed (9) is shown as to each employe the total of the amounts shown in Columns (3) to (8), inclusive.

The amounts respectfully shown in said monthly columns (3) to (8) inclusive were arrived at in the following manner: [247]

When one of said employes worked in a calendar month all of the 12 hour watches that would be produced by a continuous 12-24 hour assignment during that month he received his monthly pay at the rate specified by said award as applicable to his occupation and shown in the first column of the foregoing table headed Table "WA."

Where an employe worked in any one calendar month a less number of 12 hour watches than entitled him to a month's pay on the basis prescribed by said award and shown in the foregoing Table

(Testimony of Clyde W. Deal.)
"WA" he was paid—during said six months—for that calendar month on the basis of a daily rate of pay on an eight hour basis; that is to say—one and one half days pay for each 12 hour watch at a daily rate arrived at by taking the number of 12 hour watches for each calendar month in the watch assignment on which the man worked, then adding one-half thereof to arrive at the number of representative or constructive eight hour days, then multiplying that result by the daily eight hour rate (as shown in Table "WA") based on monthly rate as fixed by said Award. The daily rate of pay for employes assigned under said twelve (12) and twenty-four (24) watches, was arrived at by multiplying the monthly rate (as fixed by said award) by 12, and dividing the result by 365 eight hour days. For example:

Formula for arriving at a deckhand's fixed daily rate of eight hours:

$139.40 x 12 equals $1672.80 divided by 365 equals $4.583 or fixed as $4.58 per eight hour day.

DETAIL OF EXHIBIT "C" AS TO OVERTIME

Some of the said employes who worked in said 12-24 hour watches during said six months occasionally [248] worked more than 12 hours on one watch, which overtime has been paid for as hereinbefore described.

Column headed (10) shows the total number of hours of such overtime worked by each employe during said six months period.

(Testimony of Clyde W. Deal.)

Column headed (11) shows the amounts paid during said six months on said 12 hour hourly basis.

Column headed (12) shows additional amount paid for overtime and included in the pay voucher of September 29, 1928.

Column headed (13) shows total amount paid for overtime during said six months period.

By deducting from the amount in Column headed (2) the amount shown in Column headed (12) the result will be the amount paid by said pay voucher of September 29, 1928, for additional compensation for the watches shown in Columns (3) to (8) inclusive.

In the result of all multiplications of hours or days by a rate, hereinbefore referred to, fractions of a cent were treated as a cent only when they equalled or exceeded one-half-cent. [249]

The witness went on to testify as follows: On the basis of the carrier's figures I have prepared a statement showing the amount claimed still due on behalf of the men. This statement was prepared by following the overtime rule of the agreement and multiplying the number of 12-hour watches worked between March and August, 1928, by four. The total number of 12-hour watches are shown in Column A on the exhibit. In other words, Column A consists of taking the 12-hour watches as shown on the carrier's exhibit in columns 3, 4, 5, 6, 7 and 8 and adding them up. Column B is the number of overtime hours worked during that period by each man, arrived at by multiplying the number of 12-

(Testimony of Clyde W. Deal.)
hour watches worked by four, because there was four overtime hours worked in each watch.

Column C is the amount of money arrived at after applying the overtime hours worked by the hourly overtime rate, the overtime rate per hour being arrived at by the method outlined in the agreement itself, which is in evidence.

Column D is the amount of money paid by the carriers to each employee in the overtime checks plus a small amount, in some instances only a few cents, of overtime work in excess of the 12 hours. Those few cents are shown in Column E of the exhibit.

Column F is the overtime paid by the carriers to the employees less the few cents that were paid for overtime work in excess of the 12 hours.

Mr. SHARP: May I, with permission of counsel, make a short explanation of what those few cents amount to? A man working on a 12-hour watch may have worked, as a matter of fact, 13 hours on a particular [250] day. There is no controversy between the parties that that thirteenth hour is overtime, that has been paid for, and that is the few cents involved. All that will be involved here is whether there has been proper payment between the eight hours and twelve hours, but not in excess of 12 hours, and the few cents that are involved in these exhibits, I think, are overtime in excess of 12 hours. I think you so label them in your explanation.

(Testimony of Clyde W. Deal.)

Mr. BOOTH: I think the witness will frame it this way, if you will let me state it, the ten dollar increase in wages does not enter into this case at all. That has been paid for in full.

Mr. SHARP: That is correct.

Mr. BOOTH: Retroactive under the stipulation. And where a 12-hour man during those four months' period worked in excess of 12 hours, he has been paid that excess over 12 hours. So there is no overtime over 12 hours involved, and it is just as counsel stated, that the only question involved in this case is whether these men are entitled to have pay for overtime in excess of eight hours worked on each of those watches. Is that correct?

THE WITNESS: That is correct.

Mr. SHARP: These small amounts, 40 and 90 cents, is the overtime in excess of 12 hours. In order to make the amount come out even you have to add or subtract as the case may be. Q. What is column G? A. Column G is the amount due, now due, each man, arrived at by subtracting column F from column C. In other words, column C is the total amount of overtime due, in the manner arrived at by this computation, and column G represents the balance due after subtracting the check received.

Mr. SHARP: I ask that this go in as plaintiff's Exhibit No. 10. I offer it in evidence.

The COURT: Admitted. (The document was marked plaintiff's Exhibit No. 10). Said

EXHIBIT NO. 10.

is in words and figures as follows: [251]

(Testimony of Clyde W. Deal.)

EXHIBIT NO. 10

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

LIST OF MARINE FIREMEN MAKING ASSIGNMENTS OF WAGE BALANCES DUE THEM AS OVERTIME, FOR PERIOD MAR. 1 to AUG. 31, 1928

	Names	Column A Total 12 hr. watches ac per Exhibit C, S. P. answer	Column B Total overtime due at 4 hours per watch	Column C Total amount overtime compensation due at .7014 per hour (Being Column B times the hourly rate)	Column D 9/30/28 check from Exhibit C	Column E Amount included in 9/30/28 check for time in excess of 12 hrs. per watch (from Column 12, S. P. Exhibit C)	Column F Amount included in 9/30/28 check for time in excess of 8 hrs. but not more than 12 hrs. (being Column D minus E)	Column G Additional overtime due men without interest (being Column C minus F)
1	Anderson, Carl J.	122	488	$342.28	$155.97	$ .30	$155.67	$186.61
2	Anderson, Conrad	96	384	269.34	119.14	.40	118.74	150.60
3	Braumiller, Emil	113	452	317.03	137.97	.90	137.07	179.96
4	Brennan, J. J.	119	476	333.87	145.50	.10	145.40	188.47
5	Bunatsos, Tom	122	488	342.28	156.51	.50	156.01	186.27
6	Catcher, M. R.	88	352	246.89	111.63	.30	111.33	135.56
7	Chalmers, Alex	109	436	305.81	137.40	.20	137.20	168.61
8	Costa, A. L.	123	492	345.09	157.11	——	157.11	187.98
9	Crandall, Horace L.	121	484	339.48	154.62	.30	154.32	185.16
10	Cummins, Tom	115	460	322.64	145.54	——	145.54	177.10
11	Curtis, Gilbert E.	118	472	331.06	150.58	——	150.58	180.48

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
12	Daniloff, Nicholas	110	440	308.62	138.99	—	138.99	169.63
13	Davidson, George	123	492	345.09	157.11	—	157.11	187.98
14	Dineen, Michael	122	488	342.28	155.77	.40	155.37	186.91
15	Dion, David	101	404	283.37	127.23	.90	126.33	157.04
16	Domingoes, Joseph R.					—		
17	Dunn, James N.	105	420	294.59	138.37	—	138.37	156.22
18	Edwards, Zene M.	124	496	347.89	149.90	.10	149.80	198.09
19	Eide, Hans	117	468	328.26	143.20	—	143.20	185.06
20	Enos, John					—		
21	Esteller, Joaquin	123	492	345.09	158.51	.30	158.21	186.88
22	Fernandes, Roger	122	488	342.28	148.71	—	148.71	193.57
23	Fernandez, Y.	123	492	345.09	157.40	.30	157.10	187.99
24	Fitzgerald, M. J.	123	492	345.09	157.11	—	157.11	187.98
25	Foss, Reidar	121	484	339.48	147.60	—	147.60	191.88
								[252]
26	Gallagher, Cornelius	116	464	$325.45	$149.42	—	$149.42	$176.03
27	Gardner, Robert E.	123	492	345.09	157.21	.10	157.11	187.98
28	Gluck, Sam	121	484	339.48	154.52	.30	154.22	185.26
29	Gonzales, Raymond	117	468	328.26	143.19	.10	143.09	185.17
30	Hagberg, N. A.	50	200	140.28	63.46	.50	62.96	77.32
31	Hanson, N. O.	121	484	339.48	154.52	.30	154.22	185.26
32	Harner, Hoyt I.	89	356	249.70	115.57	—	115.57	134.13

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
33	Hartley, Arthur C.	122	488	342.28	156.01	—	156.01	186.27
34	Hayden, John J.	112	448	314.23	141.19	—	141.19	173.04
35	Heineman, Fred S.	119	476	333.87	145.26	.20	145.06	188.81
36	Holland, Michael	112	448	314.23	138.20	.50	137.70	176.53
37	Hooper, Robert L.	63	252	176.75	82.11	—	82.11	94.64
38	Hope, Finn	121	484	339.48	153.99	.10	153.89	185.59
39	Hosier, Leon	106	424	297.39	127.93	.20	127.73	169.66
40	Ives (Ivie), Claude L.	102	408	286.17	130.46	1.31	129.15	157.02
41	Johanson, Adolph	123	492	345.09	152.58	—	152.58	192.51
42	Karsten, Hubert	109	436	305.81	141.73	—	141.73	164.08
43	Kennedy, Louis J.	34	136	95.39	38.42	—	38.42	56.97
44	Kennedy, Samuel	91	364	255.31	116.08	1.10	114.98	140.33
45	Klemmick, Alfred H.	—				—		
46	Knobelaugh, A. K.	120	480	336.67	145.81	—	145.81	190.86
47	Lally, John	123	492	345.09	157.11	—	157.11	187.98
48	Leimar, Louis J.	81	324	227.25	99.17	.40	98.77	128.48
49	Leland, Earl	121	484	339.48	147.26	—	147.26	192.22
50	Linehan, James L.	104	416	291.78	122.67	—	122.67	169.11
51	Linhares, Joseph	122	488	342.28	154.91	—	154.91	187.37
52	Lopes, John P.	123	492	345.09	157.11	—	157.11	187.98
53	Lyons, Joseph E.	71	284	199.20	84.63	—	84.63	114.57

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
54	Malcomson, John	46	184	129.06	64.26	1.40	62.86	66.20
55	Mardis, Louis	114	456	319.84	146.63	.20	146.43	173.41
56	McGue, James	42	168	117.84	53.47	——	53.47	64.37
57	McIntyre, A. B.	117	468	328.26	148.54	.10	148.44	179.82
58	Murray, Robert E.	95	380	266.53	121.23	.80	120.43	146.10
59	Nissen, James A.	112	448	314.23	135.82	.20	135.62	178.61
60	Noaks, George	120	480	336.67	146.70	.30	146.40	190.27
								[253]
61	Olson, Nils	——				——		
62	Oyaczo, Edwin M.	105	420	$294.59	$131.87	.10	$131.77	$162.82
63	Perry, Manual	4	16	11.22	5.79	——	5.79	5.43
64	Phillips, Eugene T.	51	204	143.09	64.26	1.00	63.26	79.83
65	Price, Fred	——						
66	Price, Lloyd	122	488	342.28	154.02	——	154.02	188.26
67	Pritchard, Charles	101	404	283.37	118.41	.10	118.31	165.06
68	Rahill, Walter	118	472	331.06	152.11	.50	151.61	179.45
69	Ransom, R. B.	99	396	277.75	121.69	.70	120.99	156.76
70	Rico, E.	123	492	345.09	153.63	.10	153.53	191.56
71	Roberts, Hubert A.	89	356	249.70	119.83	.90	118.93	130.77
72	Rowland, Lusky	27	108	75.75	35.60	——	35.60	40.15
73	Sancken, Louis	105	420	294.59	130.57	1.00	129.57	165.02

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
74	Scholl, Joseph A.	112	448	314.23	138.36	.30	138.06	176.17
75	Sliscovich, John J.	118	472	331.06	145.05	——	145.05	186.01
76	Stanford, S. B.	118	472	331.06	143.02	.10	142.92	188.14
77	Stern, Frank	9	36	25.25	12.68	——	12.68	12.57
78	Tinker, L. C.	83	332	232.86	105.93	.10	105.83	127.03
79	Van Avsdall, L. W.	121	484	339.48	154.87	.30	154.57	184.91
80	Wall, Phillip	44	176	123.45	62.64	——	62.64	60.81
81	Wemmer, Edwin	117	468	328.26	150.12	.30	149.82	178.44
82	Wendelbo, Fred M.	123	492	345.09	157.32	.20	157.12	187.97
83	White, Henry F.	102	408	286.17	127.07	——	127.07	159.10
84	Wilkinson, George	121	484	339.48	154.97	.40	154.57	184.91
85	Wolslegal, Erwin	92	368	258.12	116.43	——	116.43	141.69
	TOTALS	8,226	32,904	$23,078.91	$10,355.28	$19.21	$10,336.07	$12,742.84

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(Testimony of Clyde W. Deal.)

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

LIST OF DECK HANDS MAKING ASSIGNMENTS OF WAGE BALANCES DUE THEM AS OVERTIME, FOR PERIOD MAR. 1 to AUG. 31, 1928

	Names	Column A Total 12 hr. watches as per Exhibit C, S. P. answer	Column B Total overtime due at 4 hours per watch	Column C Total amount overtime compensation due at .6684 per hour	Column D 9/30/28 check from Exhibit C	Column E Amount included in 9/30/28 check for time in excess of 12 hrs. per watch (from Column 12 S. P. Exhibit C)	Column F Amount included in 9/30/28 check for time in excess of 8 hrs. but not more than 12 hrs. (being Column 2 minus 12)	Column G Additional overtime due men without interest (being Column C minus F)
86	Akinoff, Viachaslow	123	492	$328.71	$149.61	——	$149.61	$179.10
87	Algraya, Peter	60	240	160.34	76.60	$ .85	75.75	84.59
88	Alyes, Edwin V.	122	488	326.03	148.86	.29	148.57	177.46
89	Anderson, C. E.	121	484	323.36	140.57	——	140.57	182.79
90	Anderson, Carl I.	122	488	326.03	148.23	——	148.23	177.80
91	Anderson, Floyd L.	57	228	152.33	64.30	——	64.30	88.03
92	Avelar, Antonio	123	492	328.71	149.61	——	149.61	179.10
93	Avelino, Walter	41	164	109.57	51.78	1.24	50.54	59.03
94	Babb, Dempsey E.	122	488	326.03	149.48	1.24	148.24	177.79
95	Ballard, Cecil J.	37	148	98.88	45.54	.19	45.35	53.53
96	Banks, Frank J.	116	464	310.00	135.81	.48	135.33	174.67
97	Barrett, Edward B.	121	484	323. 36	147.72	.85	146.87	176.49

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
98	Barton, Emery V.	94	376	251.21	118.60	—	118.60	132.61
99	Batchelder, James	123	492	328.71	149.61	—	149.61	179.10
100	Batchelder, Lawrence	123	492	328.71	149.61	—	149.61	179.10
101	Bennett, Ernest C.	108	432	288.62	126.96	—	126.96	161.66
102	Benson, Albert R.	—	—	—	—	—	—	—
103	Berger, Adolph F.	121	484	323.36	148.14	.95	147.19	176.17
104	Bertao, John	48	192	128.28	60.84	—	60.84	67.44
105	Bertolani, Sebastiano	122	488	326.03	141.60	—	141.60	184.43
106	Bettencourt, Carmel	107	428	285.95	128.04	.48	127.56	158.39
107	Bird, Herbert	122	488	326.03	141.60	—	141.60	184.43
108	Borges, George C.	104	416	277.93	120.73	.19	120.54	157.39
109	Botzer, Max F.	123	492	328.71	147.29	—	147.29	181.42
110	Bradley, James	78	312	208.45	95.22	—	95.22	113.23
								[255]
111	Bradley, Joseph	123	492	$328.71.	$328.61	$—	$149.61	$179.10
112	Braga, J. R.	123	492	328.71	149.61	—	149.61	179.10
113	Branz, Joseph	114	456	304.65	137.26	.29	136.97	167.68
114	Brickey, John A.	123	492	328.71	149.61	—	149.61	179.10
115	Brosnan, Dennis	123	492	328.71	149.61	.10	149.51	179.20
116	Bruce, Charles L.	123	492	328.71	149.61	—	149.61	179.10
117	Burgstrom, Albert C.	118	472	315.34	138.18	.10	138.08	177.26

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
118	Cannistra, Antonio	123	492	328.71	149.61	——	149.61	179.10
119	Capello, John F.	120	480	320.69	146.35	.85	145.50	175.19
120	Castro, Antone	120	480	320.69	139.18	——	139.18	181.51
121	Cepo, Joseph	122	488	326.03	148.33	.10	148.23	177.80
122	Coelho, Manuel	123	492	328.71	149.61	——	149.61	179.10
123	Collose, Angelo	123	492	328.71	149.61	——	149.61	179.10
124	Conroy, Thomas J.	123	492	328.71	149.61	——	149.61	179.10
125	Corriea, John R.	64	256	171.03	74.93	——	74.93	96.10
126	Corriea, Raymond A.	119	476	318.02	138.94	.48	138.46	179.56
127	Corriea, Raymond C.	116	464	310.00	137.32	——	137.32	172.68
128	Corvello, Alfred	120	480	320.69	139.18	——	139.18	181.51
129	Corry, Edward	86	344	229.83	103.93	——	103.93	125.90
130	Castanho, John	——				——		
131	Dalke, Charles	114	456	304.65	140.01	.48	139.53	165.12
132	Dalke, Jake	46	184	122.93	58.78	.67	58.11	64.82
133	Danberg, Karl F.	122	488	326.03	148.23	——	148.23	177.80
134	Delmore, James A.	122	488	326.03	141.79	.19	141.60	184.43
135	Dewerd, Adrain J.	94	376	251.21	114.72	.10	114.62	136.59
136	Dias, C. J.	123	492	328.71	149.61	——	149.61	179.10
137	Durkee, Ralph A.	122	488	326.03	143.98	——	143.98	182.05
138	Eastman, Gus	112	448	299.31	135.45	——	135.45	163.86

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
139	Edgerton, Clark	121	484	323.36	147.43	.59	146.84	176.52
140	Edwards, Bert E.	44	176	117.59	53.40	.39	53.01	64.58
141	Ervin, Henry A.	24	96	64.14	27.44	—	27.44	36.70
142	Evenson, John	36	144	96.21	43.34	.67	42.67	53.54
143	Everett, Charles	118	472	315.34	143.58	.19	143.39	171.95
144	Fernandez, Julius	121	484	323.36	148.02	.49	147.53	175.83
145	Fernandez, V. A.	—				—		
146	Ferriera, Jesse K.	122	488	326.03	141.60	—	141.60	184.43
147	Foley, Martin	121	484	323.36	147.24	.49	146.75	176.61
148	Foster, Charles	123	492	328.71	149.90	.29	149.61	179.10
149	Freitas, John	123	492	328.71	150.09	.48	149.61	179.10
150	Freitas, John C.	123	492	328.71	149.61	—	149.61	179.10
								[256]
151	Freitas, Thomas	121	484	$323.36	$147.24	$ .39	$146.85	$176.51
152	Freibe, Erwin	123	492	328.71	149.61	—	149.61	179.10
153	Freidericks, Gus	123	492	328.71	149.61	—	149.61	179.10
154	George, Peter L.	123	492	328.71	149.80	.19	149.61	179.10
155	Goncalves, Jos. F.	57	228	152.33	71.92	—	71.92	60.41
156	Gooseh, Emil E.	119	476	318.02	145.43	—	145.43	172.59
157	Green, Charles	65	260	173.71	76.65	—	76.65	97.06
158	Green, George	120	480	320.69	138.84	—	138.84	181.85
159	Griffin, Edwin	10	40	26.72	13.36	—	13.36	13.36

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
160	Gruzdeff, J. E.	103	412	275.26	123.40	.38	123.02	152.24
161	Gunderson, Trygve	45	180	120.26	49.42	—	49.42	70.84
162	Hall, James T.	120	480	320.69	139.18	—	159.18	181.51
163	Hand, Edward	112	448	299.31	131.14	—	131.14	168.17
164	Hansen, Chris M.	89	356	237.84	102.75	—	102.75	135.09
165	Hansen, Hans K. K.	121	484	323.36	143.21	—	143.21	180.15
166	Hansen, Hans P.	121	484	323.36	134.16	.58	133.58	189.78
167	Hansen, Victor	109	436	291.29	127.53	.20	127.33	163.96
168	Harper, Jos. L.	18	72	48.10	20.50	—	20.50	27.60
169	Hendricks, Henry (Harvey)	113	452	301.98	135.83	—	135.83	166.15
170	Henriques, Francisco	123	492	328.71	149.61	—	149.61	179.10
171	Hitchcock, Henry	114	456	304.65	140.19	—	140.19	164.46
172	Horasek, Joseph	123	492	328.71	150.19	.59	149.60	179.11
173	Hughes, Albert G.	—				—		
174	Ignacio, Manual F.	123	492	328.71	149.61	—	149.61	179.10
175	Iverson, Harold	122	488	326.03	148.23	—	148.23	177.80
176	Iverson, Johan I.	57	228	152.33	72.58	—	72.58	79.75
177	Jerome, Manuel	121	484	323.36	147.52	—	147.52	175.84
173	Joaquin, Manual	122	488	326.03	148.52	.29	148.23	177.80
179	Jogoloff, Peter	117	468	312.67	143.63	.29	143.34	169.33
180	Johanson, Hans T.	123	492	328.71	149.61	—	149.61	179.10

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(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
181	Johnson, E.	43	172	$114.91	$ 45.99	$——	$ 45.99	$ 68.92
182	Johnson, Halvor	123	492	328.71	149.61	——	149.61	179.10
183	Jones, Albert H.	60	240	160.34	73.45	——	73.45	86.89
184	Kayser, George H.	122	488	326.03	141.60	——	141.60	184.43
185	Keintz, Arch F.	119	476	318.02	144.77	——	144.77	173.25
186	King, Ferdinand G.	59	236	157.67	68.39	——	68.39	89.28
187	King, Vaughn M.	122	488	326.03	141.60	——	141.60	184.43
188	Knutson, John F.	95	380	253.88	104.68	.29	104.39	149.49
189	Kristensen, John M.	120	480	320.69	139.71	.20	139.51	181.18
190	Kritsky, Dimetry D.	123	492	328.71	149.90	.22	149.68	179.03
191	Laine, Andrew	123	492	328.71	149.61	——	149.61	179.10
192	Lally, Martin F.	52	208	138.96	61.38	——	61.38	77.58
193	Lamoreaux, Eugene	91	364	243.19	105.51	——	105.51	137.68
194	Larsen, John	123	492	328.71	149.61	——	149.61	179.10
195	Lerch, Adalbert R.	58	232	155.00	70.97	——	70.97	84.03
196	Levchenko, Theo.	114	456	304.65	130.58	——	130.58	174.07
197	Levine, Esser	85	340	227.15	101.18	.29	100.89	126.26
198	Lomba, Charles Q.	123	492	328.71	149.61	——	149.61	179.10
199	Lomba, John Q.	122	488	326.03	141.60	——	141.60	184.43
200	Lombard, Henry C.	109	436	291.29	123.68	——	123.68	167.61
201	Lopes, John P.	——				——		
202	Luebcke, Elmer	67	268	179.05	82.82	.10	82.72	96.33

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
203	Lukas, Joe	120	480	320.69	139.81	.30	139.51	181.18
204	Marks, Joseph R.	82	328	219.14	106.45	1.71	104.74	114.40
205	Marshall, J. J.	122	488	326.03	148.52	.29	148.23	177.80
206	Martin, John	121	484	323.36	148.11	.59	147.52	175.84
207	Mason, Sydney B.	75	300	200.43	90.22	——	90.22	110.21
208	Massey, Cornelius	100	400	267.24	125.55	——	125.55	141.69
209	Mathias, Joseph M.	121	484	323.36	140.66	.10	140.56	182.80
210	Mathiesen, Antone	123	492	328.71	149.61	——	149.61	179.10
								[258]
211	McCarten, Charles	116	464	$310.00	$135.32	$ ——	$135.32	$174.68
212	McCarthy, Michael	122	488	326.03	141.60	——	141.60	184.43
213	McNamara, John E.	——				——		
214	Messer, Allen R.	123	492	328.71	150.39	.77	149.62	179.09
215	Meyer, John C.	110	440	293.96	136.37	.69	135.68	158.28
216	Miller, Antone F.	99	396	264.57	116.54	——	116.54	148.03
217	Moniz, Antone P.	115	460	307.33	131.95	——	131.95	175.38
218	Moniz, Antonio	122	488	326.03	141.60	——	141.60	184.43
219	Moniz, Joe	——				——		
220	Morris, Charles C.	122	488	326.03	141.60	——	141.60	184.43
221	Morrison, Roscoe	67	268	179.05	80.69	.95	79.74	99.31
222	Moyer, John	99	396	264.57	124.50	——	124.50	140.07

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
223	Murphy, Peter B.	123	492	328.71	149.61	—	149.61	178.10
224	Nadjaf, Aslon	65	260	173.71	79.97	—	79.97	93.74
225	Naro, Joseph	97	388	259.22	112.17	.38	111.79	147.43
226	Nelson, Victor E.	122	488	326.03	141.61	—	141.61	184.42
227	Nielsen, Harold E.	121	484	323.36	140.22	—	140.22	183.14
228	Nillson, Martin	89	356	237.84	102.75	—	102.75	135.09
229	Noonan, William	117	468	312.67	149.35	.38	148.97	163.70
230	Oldham, Albert E.	43	172	114.91	55.50	.85	54.65	60.26
231	Ollino, Carlo	—				—		
232	Olsen, Arthur A.	89	356	237.84	106.81	.38	106.43	131.41
233	Olsen, Harold A.	123	492	328.71	149.71	.10	149.61	179.10
234	Olsen, Sverre K.	123	492	328.71	149.61	—	149.61	179.10
235	Olson, Erick G.	119	476	318.02	145.43	—	145.43	172.59
236	Olson, Ole	123	492	328.71	149.61	—	149.61	179.10
237	O'Neill, Michael	111	444	296.64	126.44	—	126.44	170.20
238	Oupe, Paul	29	116	77.50	35.48	.76	34.72	42.78
239	Park, Henry T.	123	492	328.71	149.61	—	149.61	179.10
240	Parke, William L.	119	476	318.02	144.87	.10	144.77	173.25
241	Paulino, Manuel	9	36	24.05	12.07	—	12.07	11.98
242	Paulson, W. B.	—				—		
243	Penney, Lester E.	30	120	80.17	33.26	.85	32.41	47.76
244	Perry, A. A.	121	484	323.36	140.22	—	140.22	183.14

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
245	Perry, Frank J.	32	128	85.52	44.09	——	44.09	41.43
246	Perry, Manuel	119	476	318.02	138.46	——	138.46	179.56
247	Perry, Ray J.	76	304	203.10	93.46	——	93.46	109.64
248	Pimental, Joseph	123	492	328.71	149.80	.19	149.61	179.10
249	Popoff, Nicholas	122	488	326.03	141.60	——	141.60	184.43
250	Pulrar, Joseph	120	480	320.69	145.67	.57	145.10	175.59
								[259]
251	Quirk, George	123	492	$328.71	$149.71	$ .10	$149.61	$179.10
252	Raynor, Robert G.	97	388	259.22	120.75	——	120.75	138.47
253	Reilly, Francis J.	13	52	34.74	17.92	——	17.92	16.82
254	Ritchie, George	109	436	291.29	133.25	.29	132.96	158.33
255	Rogers, Manuel G.	1	4	2.67	1.05	——	1.05	1.62
256	Rose, Jesse E.	119	476	318.02	138.46	——	138.46	179.56
257	Rontery, Harold E.	45	180	120.26	50.95	——	50.95	69.31
258	Rubanow, K. (Roobanoff)	120	480	320.69	139.51	——	139.51	118.18
259	Samuelson, John	123	492	328.71	149.61	——	149.61	179.10
260	Santos, K. R.	90	360	240.52	109.11	——	109.11	131.41
261	Sargent, Sydney	112	448	299.31	135.11	——	135.11	164.20
262	Schur, John K.	114	456	304.65	137.20	——	137.20	167.45

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
263	Seitz, Max A.	123	492	328.71	149.61	—	149.61	179.10
264	Sersa, Frank	115	460	307.33	134.28	—	134.28	173.05
265	Sevan, Alton	122	488	326.03	143.59	—	143.59	182.44
266	Sherrill, H. D.	46	184	122.93	57.10	—	57.10	65.83
267	Sherrill, Worth C.	64	256	171.03	78.92	—	78.92	92.11
268	Simpson, Frank	96	384	256.55	113.59	.19	113.40	143.15
269	Smetanin, Alexander	113	452	301.98	133.13	.19	132.94	169.04
270	Smetanin, Victor	113	452	301.98	138.96	.48	138.48	163.50
271	Smith, Edward	97	388	259.22	112.78	—	112.78	146.44
272	Smith, James J.	114	456	304.65	137.21	—	137.21	167.44
273	Smith, Leo	12	48	32.07	12.94	.38	12.56	19.61
274	Solton, Manuel G.	—				—		
275	Souza, Antone F.	116	464	310.00	139.96	—	139.96	170.04
276	Souza, Antone P.	123	492	328.71	149.71	.10	149.61	179.10
277	Souza, John M.	122	488	326.03	141.60	—	141.60	184.43
278	Strangeland, Jacob	122	488	326.03	141.27	—	141.27	184.76
279	Stevenson, V. J.	72	288	192.41	85.96	—	85.96	106.45
280	Stillings, Eugene	121	484	323.36	147.52	—	147.52	175.84
								[260]
281	Swanson, Arthur	—	—	$ —	$ —	$ —	$ —	$ —
282	Swanson, Harry	—	—	—	—	—	—	—

(Testimony of Clyde W. Deal.)

		Column A	Column B	Column C	Column D	Column E	Column F	Column G
283	Quirero, H.	121	484	$323.36	$147.19	——	147.19	176.17
284	Thechares, N.	123	492	328.71	149.61	——	149.61	179.10
285	Thompson, Fay	43	172	114.91	51.97	——	51.97	62.94
286	Thomassen, Thomas G.	122	488	326.03	148.23	——	148.23	177.80
287	Tomkinson, Ernest	122	488	326.03	141.70	.10	141.60	184.43
288	Trigvero, Antone	123	492	328.71	149.61	——	149.61	179.10
289	Trigvero, M. F.	115	460	307.33	131.95	——	131.95	175.38
290	Ushanoff, Basil	122	488	326.03	148.57	——	148.57	177.46
291	Valladso, A. A.	100	400	267.24	118.58	——	118.58	148.66
292	Vargas, John R.	123	492	328.71	149.61	——	149.61	179.10
293	Vlasich, L.	——				——		
294	Ward, Fred	100	400	267.24	118.06	.19	117.87	149.37
295	Weaver, William	43	172	114.91	57.62	——	57.62	57.29
296	Wilkman, Charles	123	492	328.71	149.61	——	149.61	179.10
297	Williams, William	71	284	189.74	86.11	.20	85.91	103.83
298	Wilson, Dudley	111	444	296.64	135.07	——	135.07	161.57
299	Young, Peter	40	160	106.90	41.77	——	41.77	65.13
300	Zachary, Alex	120	480	320.69	146.14	——	146.14	174.55
301	Zundina, Chas. W.	123	492	328.71	149.61	——	149.61	179.10
	TOTALS	20,634	82,336	$55,142.49	$24,754.82	$29.90	$24,724.92	$30,417.57

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(Testimony of Clyde W. Deal.)

NORTHWESTERN PACIFIC RAILROAD COMPANY

LIST OF MARINE EMPLOYEES MAKING ASSIGNMENTS OF WAGE BALANCES DUE THEM AS OVERTIME, FOR PERIOD MAR. 1 to AUG. 31, 1928

	Names		Column A Total 12 hr. watches as per Exhibit C, N. W. P. answer	Column B Total overtime due at 4 hours per watch	Column C Total amount overtime compensation due at .6684 per hour	Column D 9/30/28 check from Exhibit C	Column E Amount included in 9/30/28 check for time in excess of 12 hrs. per watch (from Column 12 N. W. P. Exhibit C)	Column F Amount included in 9/30/28 check for time in excess of 8 hrs. but not more than 12 hrs. (being Column 2 minus 12)	Column G Additional overtime due men without interest (being Column C minus F)
1	Adamson, G. D.	(d)	112	448	$299.31	126.55	$ ——	126.55	172.76
2	Cordoza, M.	(d)	109	436	291.29	130.00	——	130.00	161.29
3	Collins, M. J.	(d)	123	492	328.71	148.87	.04	148.83	179.88
4	Connor, Geo. M.	(d)	26	104	69.48	29.61	.35	29.26	40.22
5	Detele, Syd. A.	(d)	120	480	320.69	140.54	——	140.54	180.15
6	Englund, Nels E.	(d)	123	492	328.71	148.87	.04	148.83	179.88
7	Helgasson	(d)	122	488	326.03	140.82	——	140.82	185.21
8	Hokanson, F.	(d)	123	492	328.71	148.83	——	148.83	179.88
9	Hunt, W. U. (Urcharko, W.)	(d)	116	464	310.00	133.11	——	133.11	176.89
10	Joaquin, M.	(d)	122	488	326.03	140.82	——	140.82	185.21
11	Johnson, Alf.	(d)	114	456	304.65	135.70	——	135.70	168.95
12	Knudson, S.	(d)	118	472	315.34	133.77	.38	133.39	181.95
13	Lindekrans, Fred	(d)	123	492	328.71	148.83	——	148.83	179.88

(Testimony of Clyde W. Deal.)

			Column A	Column B	Column C	Column D	Column E	Column F	Column G
14	Mattos, A.	(d)	88	352	235.17	101.19	——	101.19	133.98
15	Mowrey, O. R.	(d)	121	484	323.36	141.72	.04	141.68	181.68
16	Nealon, I.	(d)	118	472	315.34	147.17	.04	147.13	168.21
17	Nelson, Emil	(d)	121	484	323.36	148.55	——	148.55	174.81
18	Stone, A. J. (Oushanoff, A.)	(d)	120	480	320.69	144.54	——	144.54	176.15
19	Stamatoff, N.	(d)	116	464	310.00	124.89	.65	124.24	185.76
20	Taylor, Pete	(d)	64	256	171.03	77.83	——	77.83	93.20
									[262]
21	Weimann, Geo.	(d)	116	464	$310.00	$143.02	$1.04	$141.98	$168.02
22	Olivera, S. N.	(d)	121	484	323.36	136.81	——	136.81	186.55
23	Creighton, W. J. Jr.	(f)	109	436	305.81	131.86	——	131.86	173.95
24	Herulizi, Wm.	(f)	74	296	207.61	88.85	.05	88.80	118.81
25	Hoag, Leonard	(f)	97	388	272.14	114.35	——	114.35	157.79
26	Jacoli, Otto	(f)	110	440	308.62	138.22	——	138.22	170.40
27	Jukich, F. Jr.	(f)	110	440	308.62	139.44	1.22	138.22	170.40
28	Lucas, Alfred	(f)	——	——	——	——	——	——	——
29	Shine, Thomas	(f)	105	420	294.59	121.13	1.08	120.05	174.54
30	Taylor, N. D.	(f)	122	488	342.28	148.52	——	148.52	193.76
31	Hallett, A. F.	(w)	129	516	297.99	117.59	——	117.59	180.40
32	Jones, N. L.	(cw)	119	476	318.02	129.66	——	129.66	188.36
	TOTALS		3,411	13,644	$9,165.65	$4,001.66	$4.93	$3,996.73	$5,168.92

[263]

(Testimony of Clyde W. Deal.)

The witness continued: In the exhibits the first group is only Southern Pacific, the smaller exhibits cover the Northwestern Pacific employees. The first set is as to the firemen, the second as to deck hands. All were prepared in the same way. The names are all listed to correspond with the listing in the carrier's exhibits. After the checks were paid to the men on account of the judgment of September 1928, demand was made on the defendants for the extra compensation claimed by the men. At first the demand was made orally and was followed up very shortly after in writing by a letter dated January 9, 1929, to which replies were received from the Southern Pacific Company under date of January 17, 1929, and on behalf of the Northwestern Pacific Railroad Company under date of January 22, 1929. These letters were served on behalf of the Ferryboatmen's Union and made demands, calling the attention of the carriers to their failure to pay the proper amounts to the men.

These letters and answers were duly offered and admitted in evidence as

PLAINTIFF'S EXHIBIT NO. 11.

Said Exhibit No. 11 is in words and figures as follows:

(Testimony of Clyde W. Deal.)

"Registered, return receipt requested.

Derby, Sharp, Quinby & Tweedt
1000 Merchants Exchange Bldg.
San Francisco, California

January 9, 1929

Southern Pacific Company,
65 Market Street
San Francisco, California
Attention: Messrs. Burckhalter and Hancock.
Gentlemen:

It has been called to our attention by the Ferryboatmen's Union of California that apparently you have not fully complied with the judgment rendered by the United States District Court on September 29, 1928, in the case of the Atchison, Topeka & Santa Fe Railway et al vs. The Ferryboatmen's Union of California.

We call your attention to the following [264] provisions of said judgment:

'The rule pertaining to hours of service * * * shall become effective as and from March 1, 1928, and as and from said date * * * said carriers and each of them shall observe and put into effect said Rule 6, reading as follows:

* * * *

(Testimony of Clyde W. Deal.)

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions:

* * * *

(3) Where three crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed twenty-four (24) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.

(4) Where two crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed sixteen (16) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.'

We are informed that you have not paid the back pay due for March 1, 1928 in full.

You will recall that notwithstanding the Arbitration Award required you to put in the eight-hour day as of November 1, 1927, you refused to observe the award, but on the contrary took an appeal therefrom and during the appeal did not put the eight-hour day into effect. While the appeal was pending, by stipulation between us, which was incorporated in the judgment, it was agreed that if the order of the court was affirmed, the Award, so far as

(Testimony of Clyde W. Deal.)

hours were concerned, would be effective as of March 1, 1928, instead of November 1, 1927. Upon the appeal being affirmed, the rule as to hours was effective as of March 1, 1928.

In all cases, therefore, where on and after March 1, 1928, you employed men on a 12-hour basis you became liable, in accordance with our stipulation and the judgment of the court, for overtime for the four hours each day that the men worked over eight hours.

This, therefore, is to make formal demand upon you to comply with said judgment and the agreements between the parties with respect to the matters discussed and if the same be not complied with on or before the 20th day of January, 1929, we shall bring contempt proceedings and such other proceedings as may be open to us, to compel you to observe the judgment of the court and the working agreements between the parties.

Very truly,

Derby, Sharp, Quinby & Tweedt

JCS:AM

c. c. to Mr. Booth" [265]

(Testimony of Clyde W. Deal.)

"Return Receipt Requested

Derby, Sharp, Quinby, Tweedt
1000 Merchants Exchange
San Francisco, California

January 9, 1929

Northwestern Pacific Railroad Company
65 Market Street
San Francisco, California
Attention: Messrs. Maggard, Small and Fennema

Gentlemen:

It has been called to our attention by the Ferryboatmen's Union of California that apparently you are violating the judgment rendered by the United States District Court on September 28, 1928, in the case of the Atchison, Topeka & Santa Fe Railway et al.

We call your attention to the following provisions of said judgment:

On page 6, line 9, the court orders you to observe the following rule:

> 'The rule pertaining to hours of service * * * shall become effective as and from March 1, 1928, and as and from said date * * * said carriers and each of them shall observe and put into effect said Rule 6, reading as follows:

* * * * * *

(Testimony of Clyde W. Deal.)

> Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.
>
> Exceptions:
>
> * * * *
>
> (3) Where three crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed twenty-four (24) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.
>
> (4) Where two crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed sixteen (16) hours and no crew works over forty-eight (48) hours in six (6) consecutive days.'

We are informed that you have not paid the back pay due for March 1, 1928, in full.

You will recall that notwithstanding the Arbitration Award required you to put in the 8-hour day [266] as of November 1, 1927, you refused to observe the award, but on the contrary took an appeal therefrom and during the appeal did not put the 8-hour day into effect. While the appeal was pending, by stipulation between us, which is incorporated in the judgment, it was agreed that if the order of the court was affirmed, the Award, so far as hours were con-

(Testimony of Clyde W. Deal.)

cerned, would be effective as of March 1, 1928, instead of November 1, 1927. Upon the appeal being affirmed, the rule as to hours was effective as of March 1, 1928.

In all cases, therefore, where on and after March 1, 1928, you employed men on a 12-hour basis you became liable, in accordance with our stipulation and the judgment of the court, for the four hours each day that the men worked over eight hours.

Furthermore, under the schedules which you now have in effect on your three-crewed boats, you have been working the men 8 hours and 40 minutes and refusing to pay overtime for the 40 minutes, on the ground that the men do not work more than 48 hours per week.

We again call your attention to the fact that the court ordered you to observe the rule which states as follows:

'Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.'

Any watch eight hours or less therefore calls for a full day's pay. It is true that Exception 3 permits you to work the men 8 hours and 40 minutes in a day, but there is nothing in the rule which exempts you from paying overtime for that extra 40 minutes.

We also call your attention to the fact that the 48 hours per week allowable must be com-

pleted in six consecutive days, under the rule which you have been ordered by the judgment to observe. Under your present schedule this is not the case and the watches of the men run into the seventh day.

This, therefore, is to make formal demand upon you to comply with said judgment and the agreements between the parties with respect to the matters discussed and if the same is not complied with on or before the 20th day of January, 1929, we shall bring contempt proceedings and such other proceedings as may be open to us, to compel you to observe the judgment of the court and the working agreements between the parties.

Very truly,

Derby, Sharp, Quinby & Tweedt

JCS:AM

c. c. to Mr. Booth" [267]

(Testimony of Clyde W. Deal.)

"Southern Pacific Company
65 Market St.
San Francisco, California

January 17, 1929.

Messrs. Derby, Sharp, Quinby and Tweedt,
Counselors at Law
Merchants Exchange Building
San Francisco, California
Gentlemen:

Your letter January 9th, with reference to alleged noncompliance with the judgment rendered by United States District Court on Sept. 29, 1928 in case of the A. T. & S. F. Ry. Co. et al versus the Ferryboatmen's Union of California.

We know of no provision of the award of the Board of Arbitration nor in the judgment of the U. S. District Court referred to by you which would require this Company to compensate its employes on the ferryboats on the basis recited in the next to last paragraph of your letter.

Please be assured that this Company has allowed to its employes referred to by you back pay allowance in accord with the provisions of the rules of the award of the Board of Arbitration.

If you know of any rules in such arbitration award which support the claim contained in

(Testimony of Clyde W. Deal.)

your letter we shall be glad to have you refer to same more specifically, as the quotations of certain portions such award and judgment of the Court as mentioned in your letter do not support your contention for the reason that nowhere in such quotations is mention made of basis of compensation.

Yours very truly,

F. L. Burckhalter"

"Orrick, Palmer & Dahlquist
Financial Center Building
San Francisco
January 22, 1929.

Messrs. Derby, Sharp, Quinby & Tweedt,
Merchants Exchange Building,
San Francisco, California

Dear Sirs:

Your letter of January 9, 1929, addressed [268] to the Northwestern Pacific Railroad Company relative to alleged violation by that company of the award recently made in the controversy with the Ferry Boatmen's Union of California has been referred to us for reply.

You refer to three alleged violations on the part of this company: First, that the men formerly working on the twelve-hour day have not received the proper amount of back pay in accordance with the agreement of the parties.

(Testimony of Clyde W. Deal.)

We have taken this matter up with our steamship officials and, in our opinion, the payments which we have made to the men covering this back pay feature fully comply with the terms of the award and agreement.

The second point raised by you is that our men are now working eight hours and forty minutes per day and that they do not receive overtime for the forty minutes over and above eight hours. It is true that on certain days in the week the men do work eight hours and forty minutes but to compensate them for this overtime, on other days during the week they work only seven hours and twenty minutes, the total hours per week not exceeding forty-eight hours. We feel, therefore, that the men are not entitled to overtime for the forty minutes for those days on which they work over and above the eight-hour period.

The third feature to which you refer is that under present assignments the crews do not work on the basis of eight hours a day for six consecutive days. This is technically correct and has been brought about by the difficulty, if not impossibility, of so arranging our reliefs as to permit the men working the eight hours for six consecutive days. Our company will be pleased to confer with the representatives of the Union in order to work out a solution of this problem.

(Testimony of Clyde W. Deal.)

In the event that you desire to discuss with us any of the matters referred to in your letter, we would be glad to arrange a conference at which the contentions of both parties concerning the points raised by your letter could be thoroughly discussed.

Yours very truly,
Orrick Palmer & Dahlquist'' [269]

It was thereupon stipulated by counsel that all the persons' names appearing in the exhibits attached to the complaints have executed assignments to the Ferryboatmen's Union of California an unincorporated association and in turn the unincorporated association assigned the claims to the Ferryboatmen's Union of California, a corporation, plaintiff in this case.

It was further stipulated between the parties that, if there appear to be any discrepancies between the plaintiff's exhibit and the defendants' exhibit as to whether the men worked in one capacity or another, the carriers' statement should be deemed to be correct. Exhibits 8-A and 8-B comprise the carrier's statement referred to in the stipulation.

It was stipulated that all assignments mentioned were executed in favor of the unincorporated association and in turn assigned over from the unincorporated association to the present incorporated asso-

(Testimony of Clyde W. Deal.)
ciation, which incorporated itself as a corporation in accordance with the non-profit laws of the State of California on October 2, 1931.

All of the men who signed these assignments were members of the Ferryboatmen's Union at the time they performed the service and at the time the assignments were made to the best knowledge of the witness.

A copy of the form of assignment executed by the men was duly offered and admitted in evidence as Plaintiffs' Exhibit No. 12.

On cross examination

Mr. Deal testified as follows:

Shortly after these additional pay checks were delivered in the latter part of September or October, 1928, I approached Mr. Hancock in regard to it and discussed it with him. The point was a sufficient amount of money had not been received. All of my dealings in regard to the matter, so far as the Southern Pacific Company was concerned, were with Mr. Hancock, except for a short period when [270] Mr. Lang was working for the company in somewhat the same capacity. I do not remember whether he also handled the Northwestern Pacific matter.

Q. Well, had you had any discussion with Mr. Hancock before the delivery of these pay checks, as to the method to be used in comput-

(Testimony of Clyde W. Deal.)

ing the amount of the extra pay due under the award?

A. I approached Mr. Hancock and told him that in my opinion that for each 12-hour watch worked the men were entitled to 4 hours' overtime. The only discussion there was to it by Mr. Hancock was that the company would pay the men what was due them under the award. That was the extent of the discussion.

Q. To refresh your recollection, after the award was made by the arbitration board, and after we filed in this court a petition to impeach the award, do you recall the matter coming up in the course of a conference, at which you were present, and at which Captain Strothers was present, Mr. Hancock, Mr. Hill of the Santa Fe, and I think Mr. Melnikow, and others, and it being mentioned at that conference?

A. There was no conference for that purpose. It may have been discussed. But I recall that invariably there was no difference of opinion. Mr. Hancock merely said that the company would pay——

Q. Pay what?

A. —or took the position the company would pay whatever the men were due under the award.

Q. According to his construction of the award?

(Testimony of Clyde W. Deal.)

A. He didn't say that. He said the company would pay them what was coming to them, or words to that effect.

Q. How soon after these checks were made out and distributed in October, or the latter part of September, 1928, did you see one of those checks and find out what actually had been paid to those men?

A. I could not tell you how soon. It was certainly not very long thereafter. I could not tell you the exact time.

Q. How soon after the checks were distributed were you, as business manager of the Union, apprised of the method which the Southern Pacific Company and the Northwestern Pacific, and the other carriers as well, had used to figure this extra check for overtime?

A. I was not apprised of the method the companies had used to figure the overtime check until the statement was made in this court, in these proceedings by the company, explaining the method.

Q. You knew, did you not, that the company had not [271] made out these checks on the basis of paying the men four hours' overtime, as you now demand in this case?

A. Most assuredly. I knew the men had not received checks to equal that amount.

(Testimony of Clyde W. Deal.)

Q. Did you make any inquiry to ascertain what basis had been used to figure out the checks they actually received?

A. To the best of my memory invariably the answer I would get was that the company had paid the men all that was coming to them, to the men under the provisions of the award and the judgment, in the opinion of the company. Now, that is about all the argument I could get out of them, Mr. Hancock, or anybody, about it."

Mr. BOOTH: Now, before the award was made, before these arbitration proceedings were had, the 12-hour and 24-hour men received the same amount per month, if it were a judgment, as an 8- and 16-hour man received, did he not?

Mr. SHARP: Now, if the Court please——

Mr. BOOTH: This is preliminary.

Mr. SHARP: I wish to make an objection. I have no objection to your Honor hearing the testimony at all, because I think this is a case in which the Court should have everything brought to its attention, so you can understand the whole situation. I am not trying to keep the Court from hearing it. In fact, I want the Court to hear it, but I do want to make objection as to any testimony which involves men who are not working on the 12-hour watches. I anticipate this is preliminary to the argument that the purpose of the award was to

(Testimony of Clyde W. Deal.)
equalize the hourly rate or the pay between the 8-hour man and the 12-hour man. All that is incompetent, irrelevant and immaterial on the issues, whether or not the 12-hour men got what was coming to them under the award.

The COURT: Overruled; exception.

Mr. DEAL: The 12-hour men did not always get the same amount as the 16-hour men. The wages fixed in the contract were the same per month on regularly assigned watches for the 12-hour men and [272] 8-hour men, but they did not always get the same amount of money.

> "Q. But the 12-hour men worked more hours per month than the 8-hour men did and consequently their hourly earnings were less than those of the 8-hour men. Isn't that correct?
>
> A. Under the old agreement that is correct, and that also was the cause, or one of the principal points before the Arbitration Board, and that was the reason for the arbitration.
>
> Q. Yes, that there was an inequality there?
>
> A. Yes."

I knew nothing about the carriers' method of computation until it appeared in this court.

The truth is that under the company's method of computation, the men are paid less for overtime on the 12-hour watch than on the 8-hour watch. As far as we are concerned, the same overtime rate should be paid in each instance.

(Testimony of Clyde W. Deal.)

I would rather Mr. Hancock or somebody else explain the method used by the carriers, as it is rather confusing to me.

Mr. BOOTH: Q. Mr. Deal, these 12-hour men during this 6 months' period got paid a monthly salary plus the $10 increase awarded by the Board of Arbitration, did they not?

A. That is correct.

Q. Now, these checks which you have shown in the first column of this exhibit of yours, Plaintiff's Exhibit No. 10—wait a minute—in Column D of Exhibit No. 10, what were those checks for? They were not for monthly salary, were they?

A. These were the checks that the company paid the men as a result of their peculiar method of figuring the overtime.

Q. Well, peculiar or not, these checks were overtime checks, were they not?

A. So we were told.

Q. Well, they were not monthly wage checks, they were not for monthly wages, were they?

A. I assume not.

Q. And, as you say, they only included a few cents, in some cases, for time worked over 12 hours.

A. That is correct.

Q. So that these checks, didn't you understand these checks were for what the company

(Testimony of Clyde W. Deal.)

contended was the proper allowance to be made for this [273] difference between 8 and 12 hours on these watches?

A. That is correct.

Q. Yes.

A. Not the difference between 8 and 12, I don't understand anything about it, except that these were the checks that were supposed to cover overtime payments, in order to comply with the award and judgment."

* * *

Q. Now, take the first man, Carl J. Anderson, on your Exhibit No. 10. How much did the company pay him for overtime on this basis?

A. Well, your exhibit from which this is copied showed that Mr. Anderson got $155.97.

Q. Now, the difference between your construction and ours is what? In other words, what amount additional do you claim for him?

A. $186.61.

Q. That is arrived at, was it not, by taking each day as a unit and giving him 4 hours overtime for each 12-hour watch he worked?

A. That is arrived at by following the credit rules signed by the organization and the company.

Mr. BOOTH: I move to strike out that answer as not responsive. The witness is putting his own construction on the rules.

(Testimony of Clyde W. Deal.)

The COURT: Sustained. That is really what it amounts to. What Mr. Booth says is a fact, is it not, with reference to the claim for overtime. What he has just said, isn't that the fact. Read the question please.

(Question read.) A. That is correct.

The COURT: Now, will you state again the companies' position? Can you state it briefly? I am afraid if you do not state it briefly I will not be able to understand it and I will have to call in some accountant and sit down and talk it over with him.

Mr. BOOTH: Our position was this: that an 8-hour watch was not a regularly assigned watch unless the man worked 6 consecutive days per week; that therefore in computing the overtime of these 12-hour men we were entitled to 48 hours per week. Our computation was made on that basis, and that everything over 48 hours was to be [274] paid for, and that we did pay for it on a prorate basis, and that the result of that computation was to give the 12-hour men by these additional pay checks overtime checks, exactly the same compensation per hour that the 8-hour men had received who were working during the same period; and we did not lump those for 6 months as the plaintiffs contend. The method will be explained from the witness stand when we come to our case, somewhat more fully. Does that answer your Honor's question?

(Testimony of Clyde W. Deal.)

The COURT: I yet do not see it clearly. It is because I am ignorant of such matters as this. I do not understand accounting; I do not understand your method of arriving at these amounts.

At this point the chart heretofore marked plaintiffs' Exhibit No. 1 for identification was admitted in evidence as plaintiffs' Exhibit No. 1.

The COURT: What is a straight time assignment? 12 hours?

Mr. BOOTH: There were two classes of straight time assignments, 8 hours on and 16 hours off for 6 consecutive days, and 12 hours on and 24 hours off continuously. And under the agreement of 1925 a man was not entitled to overtime if he was a 12-hour man until he had worked 12 hours on the watch.

The COURT: That has been eliminated, you say.

Mr. BOOTH: Yes. And he was not entitled to overtime if he was an 8-hour man until he had worked 8 hours on a watch, but the 8-hour man's straight time assignment was for 6 consecutive days a week. Now, these men did not work 6 days a week. The most any of them worked was 5 days a week, and we take the position, in making this computation, that we were entitled to 48 hours of service per week before the overtime began.

Mr. SHARP: That is exactly where the trouble lies, your Honor. Here we have a peculiar situa-

(Testimony of Clyde W. Deal.)

tion. The agreement called for the abolition of the 12-hour watches as of November 1st, 1927. [275]

Then pending the appeal we make an agreement that the 12-hour watch shall be abolished as of a preceding date, so you have to reduce the amount to an 8-hour basis when they have already worked 12 hours. In other words, you are trying to put in a retroactive application on the 12 hours to an 8-hour basis.

Mr. BOOTH: You don't reduce them to an 8-hour basis. You reduce them to an 8-hour assignment for 6 consecutive days, which makes 48 hours service a week.

Mr. BOOTH: Let me refresh your memory a little more, Mr. Deal. You spoke of some claim you had made before these pay checks were delivered in September or October, 1928; that the men were entitled to this 4 hours' overtime each 12-hour watch they worked. Do you recall whether that claim was made at a meeting at which Captain Strother and Mr. Deal were present, at a meeting held in the Terminal Hotel in San Francisco?

A. At a meeting held in the Terminal Hotel?

Q. Yes.

A. I don't think there was any meeting held at the Terminal Hotel in San Francisco where anything like that was discussed.

Q. Well, do you recall a meeting with the railroad representatives and Captain Strother

(Testimony of Clyde W. Deal.)

of the Masters, Mates and Pilots, and Mr. Moreno of the Engineers, with Mr. John Williams, the arbiter of the United States Board of Mediation?

A. I recall several meetings.

Q. That was after we had taken the appeal to this court, was it not?

A. That is correct.

Q. And that was in connection with arbitration agreements that had been signed by these railroads with the Masters, Mates, and Pilots, and the Engineers. Isn't that correct? They were all there together discussing these arbitration agreement?

A. I think it was in connection with that, and also in connection with the——

Q. Now, do you recall whether or not anyone representing any of the organizations made the statement at one of these meetings that the Ferryboatmen's believed they could collect 4 hours' overtime for each day on which they worked 12 hours?

A. I remember quite distinctly making that statement, myself. [276]

Q. Yes.

A. But, as I told you before, there was not any controversy because there wasn't anybody to fight with me about it. The statement was just made "We will pay you what the men are entitled to." That is all there was to it.

(Testimony of Clyde W. Deal.)

Q. Didn't Mr. Hancock say we did not agree to that?

A. I don't recall. He may have said that. I do not recall him saying that at all. I think Mr. Hancock's attitude was always this, and I think it is possibly a very fair attitude, that "We will pay the men what we think they are entitled to what the award says they should be paid, and if there is anything wrong we will take it up afterwards, as we have done in the past." I think that was the sum and substance of his statement. And I do know this much, that Mr. Hancock did not care to argue the matter at all. I just got that impression.

Q. When these pay checks were delivered to these men, these overtime pay checks, were delivered to these men in September and October, 1928, you knew of the fact that the checks had been delivered at that time, didn't you.

A. Yes. I was told the checks had been paid. That is correct.

Q. Why didn't you institute an investigation at that time to see whether this 4-hour overtime claim of yours had been followed out by the carriers in making out these checks?

A. Well, it was quite obvious, looking at the checks that I saw, that the 4-hour overtime had not been paid. But it takes some time. Mr. Booth—

(Testimony of Clyde W. Deal.)

Q. I see.

A. It takes some time to figure the time.

Q. I see. The difference was too great to allow of its having been paid.

A. I was quite convinced that it had not been paid, because it should, in my opinion, have been a much larger check." * * *

Mr. BOOTH: There was introduced here as Plaintiff's Exhibit No. 11 some letters which you identified as being demands on the Southern Pacific and Northwestern Pacific for the payment of this additional overtime. Those letters are in January, 1929. Did you take any further steps to collect this alleged overtime until you filed suit in the State court in San Francisco in March, 1931?

A. The matter was in our attorneys' hands, [277] of course, but it took us some time to gather the data from the individual members as to how much they had received and how much they were entitled to. There was considerable difficulty and it took a long time to do it. There was no court action taken, of course, between those two dates. It took us some time to accumulate these assignments.

It was stipulated between counsel that there has never been any application made by the Ferryboatmen's Union or by anyone on its behalf for a reconvention of the Arbitration Board.

(Testimony of Clyde W. Deal.)

In estimating the amount per hour claimed due for overtime the 12 and 24 hour watches were treated the same as if the men had been on 8 and 16 hour assigned watches. That is correct simply because the rule is specific and sets up the method of computing the hourly rate in the agreement, and there was only one rule after March 1st. Prior to the award and decision and judgment there was only one rule, but there was a different divisor. After March 1st there was only one divisor and that was 2504. Because of this difference in divisors, the hourly rate for the 8 and 16 hour men was greater than the hourly rate for the 12 and 24 hour men. 7014 applied to firemen. 6684 applied to deck hands. The rate of 6684 was arrived at in identically the same manner as the rate of 7014.

The witness then testified that before March 1st, because of a difference in divisors to ascertain the hourly rate, that hourly rate for the 8 and 16 hour man was greater than the hourly rate for the 12 and 24 hour men; that the 8 and 16 hour men worked a less number of hours per month before March 1st than the 12 and 24 hour men worked, and that the 8 and 16 hour men were then paid more per hour but the same amount per month.

At this point Mr. Booth renewed his motion that plaintiff elect as to the remedies they seek in this proceeding which, for the convenience of the court and counsel, has been consolidated for trial. The court thereupon denied the motion and allowed the exception. [278]

The plaintiff rested its case, whereupon the defendants presented their case (defendants' case).

A. J. HANCOCK,

called as a witness on behalf of defendants, after being duly sworn and examined testified as follows:

I am assistant general manager with the Southern Pacific Company, During 1927 and 1928 I was either assistant to the general manager or assistant to the vice-president in charge of operations. From 1927 until now I have been in general charge of labor matters for the Southern Pacific Company Pacific Lines.

I had particular charge of the arbitration which has been testified to and the matters growing out of it. I participated in it and entered into the agreement and handled most of the incidental proceedings. I heard all of Mr. Deal's testimony in this case.

Q. What is your recollection with regard to any claim that was made by Mr. Deal as Secretary and Manager of the Ferryboatmen's Union early in 1928 regarding the claim of the Union that they were entitled to overtime during the 6 months in question here, on the basis now sued on.

A. On several occasions Mr. Deal mentioned that he thought they would be entitled to overtime after the eighth hour for each 13-hour watch that had been worked.

Q. What do you recall about that, if anything?

(Testimony of A. J. Hancock.)

A. Well, my recollection of it was that I did not see any justification for the claim.

Q. Well, did you and Mr. Deal, or anyone on behalf of the Ferryboatmen's Union ever sit down after that time and agree either orally or in writing as to the basis on which these overtime checks should be issued, which were delivered to the men in October, 1928?

A. No, sir, we did not.

I was familiar with the course of the litigation in that case, the application to this court for an annulment of the award and the appeal to the Circuit Court of Appeals. After the decision in the Circuit Court of Appeals on August 20, 1928, affirming the judgment of the district court, I did in consultation with [279] representatives of the other railroad companies parties to that litigation, prescribe and send to the Accounting Departments of the respective companies a formula for the ascertainment of the amount due the Ferryboatmen for overtime who had worked on the 12 and 24 hour watches during the six months in question; except that in the case of the Southern Pacific the formula was sent to the Superintendent of Steamers to prepare the overtime payrolls and a copy to the Accounting Department for checking purposes. The Superintendent prepared the overtime payroll and the Accounting Department checked it and issued the checks.

(Testimony of A. J. Hancock.)

Q. Did you set down in writing at that time a memorandum as to the application of the award, as you construed it, to this back pay for alleged overtime over 8 hours during the 6 months by these deck hands and firemen?

A. Yes, sir.

It was upon that formula that the checks were issued.. The instructions were that the checks be prepared in accordance with the formula. Witness identified the formula and it was received in evidence and marked

DEFENDANTS' EXHIBIT A.

Said Exhibit was in words and figures as follows: [280]

MEMORANDUM as to application of (313 divisor) wage rates and method of computing back pay for Marine Firemen, Deckhands, Cabin Watchmen, and Night Watchmen, serving on 12-hour watch assignments, and who were accorded 48-hour week under Arbitration Award.

* * * * * * * * *

(Testimony of A. J. Hancock.)

Monthly, Daily and Hourly Rates of Pay are as follows:

Classification	Monthly Rate	Daily (8-Hour) Rate	Hourly Overtime Rate
Passenger and Car Ferries and Tugs Towing Car Floats.			
Fireman	$146.35	$5.6109	.7014c
Deckhand	139.40	5.3444	.6681c
Cabin Watchman	139.40	5.3444	.6681c
Night Watchman	120.00	4.6006	.5751c
Matron	85.00	3.2588	.4073c

Employes who served on twelve (12) hour watch assignments, (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is, (except on Fire Boats where there is no change) they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours.

It is concluded that the best way to arrive at the balance due any such individual, is to take the total number of eight (8) hour days, and the number of hours overtime served during a month, and multiply the same by the above enumerated daily and hourly rates, then allow as additional compensation, the difference between the total so obtained

(Testimony of A. J. Hancock.)
and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be reduced to a certain additional amount per day or hour, and so shown on the payroll for more complete record purposes.

Care should be exercised to see that credit is taken for back pay allowances on special payrolls for months of March and April, 1928, the $10.00 per month wage increase allowed, being included on regular payroll commencing with May 1st.

Under above, individual back pay allowances for months of March, April, May, June, July and August, should be computed separately for each month, but all included on one payroll, that one paycheck may be issued to cover all that is due any employe. For month of March make additional allowance only in connection with watches that were commenced at midnight of February 29th—March 1st, 1928, or thereafter. For August include on back payroll only watches commencing prior to midnight of Aug. 31st-Sept. 1st, 1928.

Commencing with Sept. 1st, 1928, such employes involved should be compensated on the new (48-hour week) basis on regular payrolls. Hours of service assignments as provided for in Rule 6 and its exceptions as contained in the Arbitration Award, should be made effective as rapidly as practicable.

A. J. HANCOCK.

San Francisco, Cal.
August 30, 1928. [281]

(Testimony of A. J. Hancock.)

The monthly rate shown in the formula includes the $10 per month watch increase granted under the arbitration award. The daily rate was arrived at under the 313 divisor, the 313 being arrived at by taking the 365 days of the year and subtracting 52 Sundays. The daily rate was arrived at in the same manner as required by Subdivision A of the note to Rule 2 of the Agreement of 1925. That rule, so far as it applied to the 8 and 16 hour watches, was not changed by the award of the Board of Arbitration. The hourly overtime rate shown in Defendants' Exhibit A was arrived at by dividing 8 into the daily rate; the hourly overtime rate, as there shown, is on the basis of an 8 hour day. There were a number of men working the 12-hour watches under some of the exceptions mentioned in Rule 6 of the Agreement of 1925 but they are not involved in this controversy.

All my memorandum, Defendants' Exhibit A, had to do with was the computation of back pay for men serving the regular assignments -12 and 24 regular assigned watches.

Mr. SHARP: Well, I am willing to stipulate what you have in mind on that, Mr. Hancock. I am willing to stipulate that no claim is made in this case as to any men who may have been worked by the company under any of the ten or twelve exceptions to Rule 6. The only claims represented here are on behalf of men who were governed by the A and B parts of Rule 6. Is that what you had in mind.

A. Yes.

(Testimony of A. J. Hancock.)

If the railroad companies had not filed any petition to impeach the award it would have gone into effect on November 1st or as soon as it would have been practical to place it in effect. On October 31st we had two classes of regularly assigned watches—the 8 and 16 hour watches and 12 and 24 hour watches. Instead of changing the 12 and 24 hour watches over to 8 and 16 hour watches [282] on November 1st, the companies applied to the court to annul or rather impeach the award and went ahead and kept the same men on the 12 and 24 hour watches who had been working on them before. And as those men dropped out of service or were transferred to some other watch the vacancy was filled and the incumbent who filled the vacancy retained the 12 and 24 hour watch arrangement. If a 12 and 24 hour watch man saw fit to take a watch off, the man who filled his place filled it as a 12 and 24 hour man.

It is not true that in computing the back pay that was paid the 12 and 24 hour men in September or October, 1928, that all of the hours they had served were lumped together and some divisor used. The formula (Exhibit A) covers that in the statement.

> "Under above, individual back pay allowances for months of March, April, May, June, July and August, should be computed separately for each month, but all included on one payroll,

(Testimony of A. J. Hancock.)

that one pay check may be issued to cover all that is due any employe."

That was done to save issuing six separate pay checks for one individual.

"Q. Now, as a part of this formula, will you state whether the formula contemplated that before a 12 and 24 hour man should be entitled to any overtime he should give 48 hours' service in a week.

A. That is correct, in so far as the straight time assigned was concerned, but, in the event a 12 and 24 hour man had worked overtime—by overtime I mean time in excess of his regular assigned watch of 12 hours,—he would then, of course, have additional compensation due him for that overtime in excess of the 12 hours at the higher rate that was established in the formula.

Q. Now, these rates that were established in the formula, that is, hourly rates, were substantially higher, were they not, than the rates which had previously been received by the 12 and 24 hour men for hourly work overtime?

A. Yes, sir, they were.

Q. Did this formula, if applied to a given case, result in paying the man who had worked 12 hours on any one watch, or succession of watches, exactly the same amount per hour as had been paid the man who worked on the 8 hour watches?

(Testimony of A. J. Hancock.)

A. Yes, sir. That is exactly the same amount for each hour [283] worked. You see, the 12 and 24 hour man had worked in any given month more hours, hence he received more money than the 8 and 16 hour man because of that fact; but his rate, the rate per hour, at which he was compensated for the excess number of hours, in fact, for all of the hours served, was exactly the same as that received by the 8 and 16 hour man."

After the Circuit Court of Appeals affirmed the award and the instructions as shown on Defendants' Exhibit A were issued, the company issued payroll vouchers for the additional amounts computed in accordance with that formula.

Mr. BOOTH: I have here, if the Court please, photostatic copies of the payroll vouchers as issued, or, rather, a sample of each payroll voucher issued, both from the Southern Pacific Company and the Northwestern Pacific Company, and in connection with our defense of payment and also in connection with our defense of relief and our defense of accord and satisfaction, I should like to offer these in evidence with the understanding that counsel will stipulate that all of the plaintiffs' assignors were paid by the respective companies by the same form of payroll voucher, and that they endorsed them on the back over the word "Payee". The same is shown on these photostats.

(Testimony of A. J. Hancock.)

Mr. SHARP: That stipulation will be made, but at the same time I will ask counsel to stipulate further with respect to these checks, that the vouchers used are the customary form of vouchers in use at that time and for many years prior thereto, except that there was printed thereon, on the Southern Pacific checks, the words "For additional compensation account Arbitration Award between Southern Pacific Company and Ferryboatmen's Union, October 31, 1927, for March to August, 1928, inclusive;" and that the words "For service as shown on payroll for period indicated herein" were deleted; that with respect to the Northwestern Pacific check, the form is identical with the customary form used, first, except that the words, in rubber stamp, were placed thereon "August 31, 1928, account wage [284] adjustment." The rubber stamp was "Balance due for period March 1, 1928, to August 31, 1928, account wage adjustment."

Mr. BOOTH: The stipulation is that the companies took their ordinary forms of payroll voucher and in the case of the Southern Pacific Company they stamped on there what the counsel has read, and in the case of the Northwestern Pacific stamped what counsel has read, thus making what may be argued to be a special form of voucher.

I would like to introduce this photostatic copy of the front and back of the Southern Pacific Company's voucher as Defendants' Exhibit B, and I

(Testimony of A. J. Hancock.)
want to call the attention of the Court in this connection to the endorsement: "This voucher is endorsed as an acknowledgement of receipt of payment in full of account as stated within" "Signed" "Payee".

A sample of each Southern Pacific Company payroll voucher so issued was then received in evidence as

DEFENDANTS' EXHIBIT B

and is in words and figures as follows: [285]

Standard

Form 217

Pay-Roll Voucher—Services No. 36558

[Insignia] SOUTHERN PACIFIC COMPANY
Pacific Lines

San Francisco, California, September 30, 1928.

Pay to the
Order of Frank J. Bardoni Miscellaneous
The sum of * * * One Hundred Forty-seven & * 81-100 Dollars $147.81
Arbitration Award Between So. Pac. Co. and Ferry Boatmen's Union, Oct. 31, 1927.
For March to August, 1928, inclusive.
For Additional Compensation Account

When signed by the Assistant Treasurer or his duly authorized representative and properly endorsed by payee, this voucher becomes a sight draft on the

(Testimony of A. J. Hancock.)

Company and is payable at the office of the Company at San Francisco, Calif. [Illegible]

For Assistant Treasurer.

Oct. 18 28 C

F. L. McCaffery

[Illegible] Auditor

Payable at the option of Holder through any bank

Endorse Here

This voucher is endorsed as an acknowledgement of receipt of payment in full of account as stated within.

Frank J. Bardoni

Payee

PAID 10 16 28 (Stencil)

(Stamp) City Collections Oct. 16 1928 Bank of Italy (branch illegible) [Insignia] 1-B 63 111

Endorsements must be technically correct. If made by an "X" they should be witnessed and residence of witness stated. Signature of payee must agree with name on face of voucher. [286]

The Northwestern Pacific Railroad Company payroll voucher referred to in the evidence was then received in evidence as

DEFENDANTS' EXHIBIT C,

and is in words and figures as follows: [287]

(Testimony of A. J. Hancock.)

Form 475

Pay-Roll Voucher—Services No. 6003

Northwestern Pacific Railroad Company

San Francisco, Cal., Sep. 29 1928

This check not valid if drawn for more
than two hundred (200) dollars

To S. Anderson Dr.

Exactly $125 and 49 Cts. Dollars $125.49

Balance due for period Mar. 1'28 to Aug. 31'28

Account wage adjustment

In full for services rendered during month of Sep. 1928 N. P. 90-863

When signed by the treasurer or his duly authorized representative and properly endorsed by payee, this voucher becomes a Sight Draft and is payable at the treasurers office of this road in San Francisco, Cal.

W. A. Werner
For Treasurer.
W. B. Burris
Comptroller.

Payable at the option of holder through any bank

ENDORSE HERE

This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within.

S. Anderson
Payee.

(Testimony of A. J. Hancock.)

Received payment C.C.C. Oct. 26, 1928
Federal Reserve Bank
of San Francisco

Endorsements must be technically correct. If made by an "X," they should be witnessed and residence of witness stated. Signature of payee must agree with name on face of voucher. [288]

Q. Did you have anything to do with directing these special endorsements to be put on the Southern Pacific vouchers?

A. Yes, sir.

Q. Now, it was prior to that time that you had these conversations with Mr. Deal in which the claim here was asserted and this claim brought out for four hours' overtime on these 12-hour units?

A. Yes, sir.

Q. Will you say whether or not it was because of that attitude on the part of the representative of the men which caused this to be put on the voucher?

Mr. SHARP: I object to the question as calling for the conclusion of the witness. What was in his mind is rather speculative now, to put back his mind to that time.

The COURT: He can state what he had in mind, if that is the reason he put it on there. Objection overruled; exception.

A. Yes.

(Testimony of A. J. Hancock.)

Q. It was?

A. Yes.

On Cross-examination

Mr. Hancock testified as follows:

I never sat down and discussed with Mr. Deal, or any one representing the Union, the basis on which the checks should be made out, in the event Judge St. Sure's judgment should be affirmed. The conversations with Mr. Deal were held previous to the time the Circuit Court of Appeals passed upon the order of Judge St. Sure.

At that time no one was in a position to state what the amount of the overtime would be, as no one could foretell what the ruling of the court would be. Mr. Deal and I never agreed as to the basis upon which the checks were to be made out, if they were going to be made out at all. [289]

As a matter of fact we never even discussed the matter as to the basis upon which the checks would be made out or the manner in which the award would be applied. We never discussed that at any time. The checks were eventually issued and the formula prepared after the affirmance of the judgment without taking it up with Mr. Deal at all.

I know that the attorneys for the Union were John L. McNab, Raymond Benjamin, Joseph C. Sharp and Derby, Sharp, Quinby & Tweedt.

Mr. Booth stipulated that the carriers never consulted with the attorneys for the Ferryboatmen's

(Testimony of A. J. Hancock.)
Union with respect to complying with the judgment after the award was affirmed. The checks were given out after the judgment was obtained and no consultation was had with any of the attorneys of record whatever.

The witness testified that in preparing the formula he not only did not take it up with the attorneys for the Union but he did not take it up with Mr. Deal either. At no time was Mr. Deal or any one representing the Union told as to how the company was to compute the checks.

Going back to 1918 in the days of the Railroad Administration and on down to now, there have been hundreds of decisions rendered, to all of which one or more organizations were parties, and it has been the universal and accepted practice for an employer to go ahead and apply the provisions of any of those decisions that come down.

If there are any complaints as to whether the checks are correct or not, the ear of the carrier is always open to it. In all the decisions that have been handed down there has not been one instance where we asked the attorneys how to apply it, because we deal in that thing all the time and understand the language of them and try to apply them fairly. [290]

When we have controversies and later on a decision is handed down we make the checks out in good faith as we believe they should be made out. That is the uniform practice.

(Testimony of A. J. Hancock.)

Q. And thereafter, if there is any mistake, you cure it. In other words you are always open to have men come in and you listen to them and make corrections, if any corrections are to be made?

A. It would depend altogether on the character of the statement.

Q. In any of these numerous cases to which you have referred, Mr. Hancock, after you have made out the check, as you believe in good faith, it should have been made out, and the man comes in and tells you it should have been something else, you immediately make out the check in the proper way and always have?

A. I would not say that in a case like this. These were a special check, Mr. Sharp.

Q. Well, in every case—

A. (continuing) And issued for the purpose of disposing of the controversy and payment of the compensation that was due under the award.

Q. In all these cases, as I understand you, you try in good faith to give the men what is due them. You never try to get around any decision against by any trick or artifice; you pay what is due.

A. We may have a difference of opinion sometimes.

Q. Yes.

A. But we try to do what is right.

Q. What I am coming to now is this, Mr. Hancock. As a matter of fact, in actual practice in hun-

(Testimony of A. J. Hancock.)
dreds, if not thousands, of cases, where men have received payment from you, whether for wages or as the result of controversy, in which the usual form of check is used and the man came back to you after cashing the check and tell you more money is due, you take up their claim, don't you?

A. Are you talking about under ordinary circumstances?

Q. Under ordinary circumstances, yes.

A. Under a case where a locomotive engineer might be running, we [291] will say, between Portland and Tillamook and his time slips will come into San Francisco and the timekeeper would post up his time, the time for payment comes and one of his time slips went astray in the mail, and by virtue of that the pay check was short, the amount of one day's pay, and the man took up the case and it was found to be correct, for that amount there would be either a special check issued, a time voucher we call it, or it would be added to his pay check for the next month. That would be an accumulative condition.

Q. As a matter of fact, Mr. Hancock—

A. The handling of current earnings.

Q. As a matter of fact, Mr. Hancock, in all these years you have been with the company, and not referring to the present controversy, the company has made it a uniform practice of never refusing to take up any claims for underpayment on account of

(Testimony of A. J. Hancock.)
checks, and made the point that inasmuch as the checks had been cashed, the man could not correct any mistakes they claim?

A. Well, we will always listen to a man's complaint.

Q. Well, could you recollect one single case in all the years you have been with the company, with your knowledge of the custom and practice of the company, involving hundreds and thousands of cases where even once the company has ever raised the objection that it would not consider the merits of the controversy because the man had cashed the check? Can you think of one such a case?

A. Well I do not know that I could definitely give you the facts with respect to an individual case, but we have a great many cases where we can not go back and allow additional compensation.

Q. That is true. There are many cases—

A. (continuing) Because the men are wrong a great many times.

Q. But the reason you refuse to pay those checks is because the men are wrong. But you have never raised the point and said "You [292] have cashed the checks and therefore we can't discuss the merits of your claim". That is correct, Mr. Hancock?

A. We will say—

Q. Now, you can't think of one such case, can you?

A. Well, I could not answer that question definitely right now.

(Testimony of A. J. Hancock.)

Q. At this time there isn't a single case to which you can call the Court's attention where you have raised that point?

A. I haven't in mind all the transactions that take place on that.

The ferry boats have been operated by us on San Francisco Bay for many years. Order No. 82 was the first general agreement made with the men.

Article 4 of order 82 reads exactly the same as Rule 6, A and B in the 1925 agreement. This has been identical in language at least since 1918 and up to the period of the 1925 agreement and today, except as modified by the Arbitration Award.

I cannot remember a single instance in which we refused to consider any claim on the point that the man had cashed the pay check and therefore the company would not consider the claim. There are a great many contentions made and I cannot remember them all.

I did not say they were making claim for overtime on a certain basis. I was given to understand they contemplated making some technical claim and it was for the purpose of forestalling those things that I changed the form of the check. I did not indicate to anyone representing the Union what was in my mind in this respect. I did not tell the Union I thought anything of that kind. I did not tell the Union or its attorney or any of its representatives why we were given checks on a special form.

(Testimony of A. J. Hancock.)

The checks I take it speak for themselves. I did not contact the attorneys. I did not tell Mr. Deal or any other officer of the Union what we were doing. My formula requires aggregating the hours by months and figuring it on that basis. That [293] is the only way you could do it, because crews would work a different number of hours, during different months.

The basis of the formula was this; the employes had contended for many years that a man on a 12-hour watch was working 56 hours a week for the same monthly wage that a man working 48 hours a week on an 8-hour watch was working, and the purpose of the formula was to equalize the two; in other words, to allow the man who was working 56 hours a week exactly the same amount of compensation per hour that the man received who was working but 48 hours a week, and it gave the man, the 56 hour week man, in addition to his monthly salary, it gave him the increased rate, the difference between the 48- and the 56-hour week for each of the 56 hours he worked, and, in addition, the higher rate of pay so arrived at for any overtime he might have worked during the period and in excess of 48 hours.

Q. The fact is that under your formula no man was entitled to overtime until he has worked 48 hours a week.

A. I will state positively it is not true.

(Testimony of A. J. Hancock.)

— and I will tell you why. If a man working, say on a 12-hour watch, his boat is late, and on that particular day he was out 13 hours, he would get an hour's overtime in excess of the 12 hours, regardless of the 48-hour feature.

As a matter of fact, on the average, the 12-hour men would work some weeks five 12-hour shifts and other weeks four 12-hour shifts.

They would average 56 hours within a cycle of three weeks. They would be on duty on 12-hour watches. So that if a man worked five 12-hour shifts one week, five 12-hour shifts another week and four 12-hour shifts the third week, in the three-week cycle that would make a total of 168 hours, or an average of 56 hours a week, in a cycle of three weeks. In that cycle of three weeks there would be one week in which the man worked four 12-hour shifts.

Q. Now in the week in which a man worked 48 hours, [294] under your formula, if you were entitled to 48 hours work before the man is entitled to overtime, under your formula he would get no overtime at all for that week.

A. He would have worked 48 hours. But you will remember that man was paid on a monthly basis.

Q. Yes.

A. He was paid on a monthly basis. That is the angle that you must consider there.

(Testimony of A. J. Hancock.)

Q. Yes, I am glad you brought that out. But let me still direct your attention to the week in which he worked four 12-hour shifts, or a total of 48 hours. Under your formula, the man having been paid a monthly salary, was entitled to no overtime pay at all because he had worked no overtime, because he had worked only 48 hours that week.

A. No. If you allocate it down to the individual week in which the man through the alternating of the crews only worked the 48 hours, my formula if applied to a man who worked under a broken shift arrangement, only four shifts, or 48 hours within that week, he would not have any overtime.

Q. And, as a matter of fact, that was the method you applied in figuring the overtime checks, samples of which have been introduced in evidence?

A. The formula says that they will be taken by the month.

We equalize the 12 and 24 hour man's compensation for every hour he worked on the basis of the compensation of the 8 and 16 hour man. In effect it gave the men that worked a 56-hour week, or a series of 56-hour weeks, for his monthly salary, it gives him an extra day's pay for each week at the higher rate of pay.

(Testimony of A. J. Hancock.)

THE COURT: Mr. Hancock tells you you have the formula and you can work it out yourself. If you don't have some one explain that I am going to call in someone to help me work it out. If you can aid me I wish you would do it.

Mr. Booth then stated that he had and would call a witness who actually made up the checks from the payrolls and who would explain the actual manner of application of the formula.

> Now, when a man worked during the period from March and the 6 months thereafter following, in 1928, a 12-hour watch, you did not allow overtime by giving the man overtime credit for the last 4 hours of each 12-hour watch, did you?
>
> A. There was a rule to cover that. [295]
>
> Q. I am asking you, did you or did you not give the man overtime for each four hours, the last four hours of each 12 hour watch?
>
> A. The overtime was prorate.

Q. Mr. Hancock, I would like to have you answer the question.

A. The rule says—

THE COURT: Never mind the rule; answer the question.

A. He was allowed one and one half days compensation.

It was not the purpose of my formula to secure to the men overtime for the last four hours of each 12-hour watch worked by them.

(Testimony of A. J. Hancock.)

The purpose was to equalize the 12 and 24 hour men [296] with the 8 and 16 hour men. It did not make any reference to the overtime feature, except we dealt in what was actually overtime.

Rule 6-A and B, which prevailed in the 1925 agreement until modified by the award is the same as was in Order 82 in 1918. From 1918 to 1925, Order 82 has been in actual practice and operation.

The 1925 agreement simply incorporated the language in the 1918 agreement and we followed and operated under that rule until around September, 1928. From then on we operated under that rule as handed down by the Arbitration Board.

When a man is on an 8 hour assignment and works ten hours under Rule 6, he is entitled to two hours overtime, if he is on a straight hour assignment. It was the practice to give overtime for that excess period since Recommendation 82. It has been the rule to allow overtime at the prorate rate for time worked in excess of the straight time assignment, except where it was provided for by the long and short watches in connection with the alternating of the crews.

THE WITNESS: Disregarding any case covered by special agreement and disregarding cases covered by the exceptions to the rules, it has been the uniform rule and practice since 1918 to date that where a man is assigned on an 8 hour watch, but as a matter of fact, on any particular day he

(Testimony of A. J. Hancock.)
works in excess of eight hours, he is entitled to overtime for that excess at a pro rata basis.

That has been the uniform rule and practice established in Recommendation 82. If a man's regular assigned hours were 8 hours and he worked in excess of that, unless it was provided for in an agreement, he would receive overtime, at a prorate rate. That started in the year 1918.

Redirect Examination

The witness testified that since 1918 the 8-hour [297] regular assigned watch has been under the following definition: "Eight hours or less on watch each day for 6 consecutive days".

That is the rule today, the rule under the 1925 agreement, under the 1919 agreement and under Order 82 of the Labor Board. During all that time, from 1918 down, the 8 hour watch was a watch of eight hours or less on watch each day for 6 consecutive days.

Friday, September 14, 1934

Mr. Hancock recalled for cross examination testified as follows:

In preparing this special form of check or payroll voucher, the only changes made were to eliminate the language "For services as shown on payroll for period indicated hereon" and to substitute therefor the words "For additional compensation account arbitration award between Southern Pa-

(Testimony of A. J. Hancock.)

cific Company and Ferryboatmen's Union October 31, 1927 for March to August, 1928, inclusive".

That is all that was added; but there was already on the back of the check a receipt in full. It was designed to close the account.

It was the general form of check currently in use. It had on the back of it the following language:

> "Endorse here. This voucher is endorsed as an acknowledgement of receipt of payment in full on account as stated within."

At the same time that form of check was currently in use there was a form distributed on the ferry boats by which the men after cashing their checks could come in and make claim for alleged shortages in wages.

Mr. BOOTH: Mr. Gorman will be our next witness and he is familiar with this. He says this is our regular shortage form, used on all divisions, including the ferry steamer division, which the man [298] fills out and submits when he claims the pay check has not taken into account as many hours as he actually worked.

It was stipulated that the form could go in evidence as Plaintiffs' Exhibit No. 13: and is in words and figures as follows:

(Testimony of A. J. Hancock.)

8-29-5M CLAIM OF SHORTAGE IN WAGES

L-7423

Mr.................................. Station............................... ....19......

....

Following is submitted in support of claim of shortage in pay check for .... period of ....19......

Date	Date	Hours Worked	Hours Claimed	Rate.	Total time claimed............at	
					....	$......................
1	16					
2	17				Amount earned at Piece	
3	18				work or Tonnage Rate	$....................
4	19					
5	20					
6	21				Total Wages claimed	$
7	22					
8	23					
9	24				LESS DEDUCTIONS	
10	25					
11	26				Hospital	$
12	27				Insurance	$
13	28					
14	29					
15	30					
**	31				Amount claimed	$....................
					Amount received	$....................
					SHORTAGE CLAIMED	$....................

Remarks: ....

....

Signed.. WORKING NO....................

It was also stipulated as part of the same stipulation that the customary practice is for a man to

(Testimony of A. J. Hancock.)
cash his check and make out one of these forms afterwards, and then take it up with the proper officials. [299]

It was also stipulated that no such forms were made out or presented by any of the plaintiff's assignors.

On further Re-direct examination
Mr. Hancock testified as follows:

There has never been any difference in the ferry service between the amount per hour paid for overtime and the amount per hour paid for the hours served on regular assigned watches. If an 8-hour man worked 10 hours, he got exactly as much and no more for the tenth hour as he did for the first hour. The effect of my formula was to give these men who had worked on 12-hour regular assigned watches exactly the same amount for the twelfth hour that they received for the first hour. That was the amount which was currently paid at the time—the rate per hour which was currently paid at the time to the 8 and 16 hour men. The hourly rate was arrived at under paragraph A of Rule 9 of the 1925 agreement. Exactly the same result is obtained by dividing the annual salary by 2504, or dividing the annual salary by 313 and dividing that by 8.

When I speak of the 313, I refer to the note to Rule 2, which also was not changed by the arbitration award, which reads:

(Testimony of A. J. Hancock.)

"Employes working broken assignments will be paid in following manner: (a) on 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313." [300]

On further Recross Examination
Mr. Hancock testified:

In the exhibit filed as "Defendants' Exhibit A" yesterday we show the hourly overtime rate as .7014. That means that the man is entitled to 70.14 cents per hour, if he is a fireman, for each hour he works, whether it is the first hour or the twelfth hour of his watch.

In obtaining the 70.14 cents per hour rate, either formula will give you exactly the same result and 7014 would be the correct hourly rate for a fireman under a new established monthly rate as set forth by the arbitration award. The hourly rate applies to the overtime hours as well as to the regular hours, so if a man works any hours overtime in excess of straight time assignment, he is paid for that extra hourage at the same rate. In the marine service the rate is prorated. In some of the other services, overtime is punitive or time and one-half the regular rates. In the case of marine employes, it is all prorated. For whatever hours overtime the men worked, the firemen worked, during the period in controversy, whatever number of hours that may be, they are entitled under the award to be

(Testimony of A. J. Hancock.)
paid for those overtime hours at the rate of 7014 per hour. Whatever hours were worked.

Mr. Sharp called the attention of the witness to his testimony that it has been the uniform rule and practice since 1918 to date that where a man is assigned on an 8-hour watch, but as a matter of fact on any particular day he works in excess of 8 hours, he is entitled to overtime for that excess at a prorate basis, and asked whether that meant an 8-hour regular assigned watch. The witness replied: "I mean or had reference to an eight hour watch that was a part of the regular eight hour assignment. In other words a man—or the assignment upon which the man served was that normally for 6 days a week. Now, you will remember that in [301] the case before us these men did not work every day of the week." If his regular assigned watch was exactly eight hours and he worked in excess of eight hours, then he would receive overtime at the prorate rate for the excess time worked. So that if on a particular day a man is assigned to an eight hour watch and works, say, nine hours, he is entitled to one hour over time at the rate of 7014 and by the same token, if that man was on an eight hour, 6 day assigned watch and worked 12 hours, he is entitled to four hours overtime, if he was on an assignment of that kind, a daily assignment. Where a man is assigned to an 8-hour watch, each hour he works in excess of 8 hours is overtime, where it was a part of an assignment of 6 days per week.

(Testimony of A. J. Hancock.)

The men were assigned on the 12 and 24 hour basis during the period the case was in court and the men were assigned to those watches by the company. All the men involved in this controversy were during the period in controversy assigned by the company to work on the 12 hour watches in the number set out in the exhibit. The men bid in the 12-hour watches and were so assigned to them. But the company assigned the watches. During the entire period in controversy the men worked on 12-hour watches which were assigned by the company.

Mr. SHARP: Was it the purpose of your formula to make a deduction for the fact that the men only worked four or five days a week instead of six?

A. Well, if you are contending from that standpoint, then you are asking for dead days on the days the men did not work. That is what you are trying to get at.

Further Redirect Examination

Mr. BOOTH: Mr. Hancock, following this same illustration by Mr. Sharp, the 8 and 16 hour man in March, 1928, worked more than 20 watches during that month, did he not? [302]

A. He worked —

Mr. SHARP: Now, just a minute please. I am going to make the same objection at this time your Honor, that any questions with respect to what

(Testimony of A. J. Hancock.)

has happened with respect to men not involved in this impeachment are incompetent, irrelevant and immaterial, and I would like to preserve that objection, though I do think in fairness to the Court it ought to hear the evidence, subject to my objection.

THE COURT: Yes, overruled.

Mr. SHARP: Exception.

Mr. BOOTH: Q. The 8 and 16 hour man who was working 8 hours on 16 hours off 6 days a week, if there were four weeks in the month of March, would work 26 eight-hour watches, wouldn't he?

A. He would work six watches each week, and four times six would be 24; he would work approximately 26 or 27 watches a month.

Q. And he would receive, if he were a fireman, under the award, $146.35 for those 26 eight-hour watches.

A. That was the monthly rate in effect, yes, sir.

Q. Yes.

A. Provided he did not lay off, of course.

Q. I understand. He worked all month. Now, this man Anderson here, assume he worked all month, and worked 20 watches, he got the same amount, didn't he, $146.35, in the final adjustment?

A. For the 20 watches he got $146.35, then subsequently he received an extra day's pay.

(Testimony of A. J. Hancock.)

Q. I know, but I am talking about before we made the adjustment.

A. Yes, sir.

Q. In controversy here.

A. Yes, sir, before the adjustment.

Q. So the two men got exactly the same amount, the 8-hour man for 26 watches and the 12-hour man for 20 watches.

A. That is correct.

Q. Now, if you reduce those 20 watches to eight hours each by taking off four hours overtime, isn't the net result of it that the 12-hour man will be getting $146.35 for 20 eight-hour watches and the 8-hour man $146.35 for 26 eight-hour watches.

A. Yes, sir, that would be right.

Q. So that the net effect of the adjustment was that you took the total number of hours the men had worked during the [303] month on this 12-hour watch and you multiplied that by 1014 and then you deduct from that the amount that had been paid him for his monthly salary. Isn't that the effect of it?

A. Yes, sir, considering straight time.

Q. Straight time, considering straight time, because overtime over 12 hours is not involved here.

A. That is right.

FRANCIS EDWARD GORMAN,

called as a witness on behalf of defendants, was duly sworn and testified as follows:

Direct Examination

I am employed by the Southern Pacific Company. At the present time as trainmaster's clerk. I handled the payrolls of the steamer division from the latter part of 1923 to the latter part of 1930. I am familiar with the adjustment that was made in September and October, 1928, with the former 12 and 24 hour men. I prepared the payroll on which these pay checks were based. In so doing I followed the principle laid down by Mr. Hancock shown in the memorandum "Defendants' Exhibit A."

For illustration we will take Fireman No. 8 on Plaintiffs' Exhibit 8-A, page one, A. L. Costa. He worked every 12-hour watch during the six months without any layoff at all. His overtime pay was figured month by month under the formula, Defendants' Exhibit A, using the base rate of 70.14 per hour, the hourly rate for a fireman. He worked 21 watches in March. We arrived at the amount paid him for the month of March as follows (Tr. p. 130):

> Previous to the award he was paid $146.35 for his whole assignment of 21 watches, previous to the adjustment under the award. When we made the adjustment we made the 21 watches into 8-hour days. That would be there 21 twelve-hour watches or 252 hours, or the equivalent of

(Testimony of Francis Edward Gorman.)

31 1/2 eight-hour days. We multiply 31 1/2 eight-hour days by the 8-hour daily rate.

It would be $176.43. We had already paid him under the 12-hour basis a monthly guarantee of $146.35; we subtract the $146.35 and the result we obtain, allowing him an additional four hours for each 12-hour watch and the net was approximately $30.08. [304]

The same method follows through each month in computing this man's additional payment.

Take the case of Anderson, number 1 on page 1 of EXHIBIT 8-A (Tr. p.131):

He worked twenty 12-hour watches. The same principle was used. For twenty12-hour watches we allowed him an additional four hours for each watch. That would give him 30 eight-hour days. Thirty 8-hour days at the 8-hour rate of 56109 would be equal to $168.33, approximately. We had already allowed him $139.38 under the 12-hour assignment rule; we subtracted that from the $168.33 and he received an adjustment of $28.94.

And he only worked 20 out of 21 watches. therefore he got one watch pay less.

I can give an illustration of a man who worked only part of the watches in a month. Page 1, No. 48 (Exhibit 8-A), Louis J. Leimar during March worked 11 twelve-hour watches. The application of the formula was:

(Testimony of Francis Edward Gorman.)

Eleven 12-hour watches, for each 12 hour watch, allowing him one and a half eight-hour days, or four hour overtime, over the eight hours would result in 16-1/2 eight-hour days. Now, 16-1/2 eight-hour days at the 8 hour rate, 56109, would give a result of $92.58—5798 hundredths, or 58 cents, approximately. Now, he had been paid at his 12-hour rate $79.10. By deducting the amount he had been paid by his 12 hour rate from what he would have been paid by the 8-hour rate, gives a result of $13.48, or the amount allowed him as additional compensation.

Q. Now, in each case, in the case of each of these men shown on Exhibit 8-A, firemen and deck hands, and there may be some cabin watchmen there, did you figure each month during those 6 months they worked in the same manner you have illustrated here to the Court?

A. Yes, sir.

Q. And that arrived at the same result as the formula Exhibit 8-A furnished you by Mr. Hancock.

A. That is the formula.

PLAINTIFFS' EXHIBIT 8-A is a mimeographed copy from an original exhibit which was prepared for use in the State court case. It is in my handwriting and I prepared the figures.

I prepared a table showing the daily, hourly and monthly rates [305] paid deck hands and firemen

(Testimony of Francis Edward Gorman.)
on the 8 and 16 hour watches and the 12 and 24 hour watches, in accordance with the arbitration award, effective May 1, 1928. This is offered in evidence as DEFENDANTS' EXHIBIT D, and is in words and figures as follows:

DAILY, HOURLY AND MONTHLY RATES PAID DECK-HANDS AND FIREMEN ON 8-16 HR. AND 12-24 HR. WATCHES IN ACCORDANCE WITH ARBITRATION AWARD EFFECTIVE MAY 1st, 1928.

8 hr. Deckhand	—monthly rate (new)	$139.40
" " "	—hourly " "	.6680
" " "	—daily—25 day mo.	$5.5760
" " "	— " —26 day mo.	$5.3615
" " "	— " —27 " "	$5.1629
12 hr. Deckhand	—monthly rate (new)	$139.40
" " "	—hourly " "	.5728
" " "	—daily " 30 days	$4.6466
" " "	— " " 31 days	$4.4257
8 hr. Fireman	—monthly rate (new)	$146.35
" " "	—hourly " "	.7013
" " "	—daily " 25 days	$5.8540
" " "	— " " 26 days	$5.6288
" " "	— " " 27 "	$5.4204
12 hr. Fireman	—monthly rate (new)	$146.35
" " "	—hourly " "	.6014
" " "	—daily " 30 days	$4.8783
" " "	— " " 31 days	$4.6460
12 hr. Watchman	—monthly rate (new)	$120.00
" " "	—hourly " "	.4932
" " "	—daily " 30 days	$4.00
" " "	— " " 31 "	$3.8095

I have also prepared a similar table with respect to deck hands and firemen on the 8 and 16 hour

(Testimony of Francis Edward Gorman.)

and 12 and 24 hour watches in accordance with the 1925 agreement. This is offered and received in evidence and marked Defendants' Exhibit E, and is in words and figures as follows: [306]

DAILY, HOURLY AND MONTHLY RATES PAID DECKHANDS, AND FIREMEN ON 8-16 HR. AND 12-24 HR. WATCHES IN ACCORDANCE WITH LABOR BOARD DECISION No. 2790 EFFECTIVE JAN'Y 16th, 1925.

8 hr. Deckhand	—monthly rate	$129.40
" " "	hourly "	.6201
" " "	daily—25 day mo.	$5.1760
" " "	" —26 " "	$4.9769
" " "	" —27 " "	$4.7926
12 hr. Deckhand	—monthly rate	$129.40
" " "	hourly "	.5318
" " "	daily—30 day mo.	$4.3133
" " "	" —31½ day mo.	4.1079
8 hr. Fireman	—monthly rate	$136.35
" " "	hourly "	.6534
" " "	daily—25 day mo.	$5.454
" " "	" —26 " "	$5.2442
" " "	" —27 " "	$5.05
12 hr. Fireman	—monthly rate	$136.35
" " "	hourly "	.5603
" " "	daily—30 day mo.	$4.545
" " "	" —31½ day mo.	$4.3286

NOTE: Employes serving 12-24 hr. extra or irregular watches paid as follows—

For 31 day month—daily rate to be arrived at on basis of 1/31st of monthly rate.

For 30 day month—daily rate 1/30th.

Employes on 8-16 hr. watches with no established day off for 30 and 31 day month rate established as 1/26th of monthly rate.

(Testimony of Francis Edward Gorman.)

A printed reproduction of a table showing the case of a fireman who began working at 6:30 A. M. on March 1, 1928, and continued working throughout the month on the 12 and 24 hour basis, and throughout each month thereafter until September 1st, the number of watches worked, the number of hours worked and the adjustment made with him by the pay check dated September 30, 1928, was offered and admitted in evidence as

DEFENDANTS' EXHIBIT F,

and is in words and figures as follows: [307]

SOUTHERN PACIFIC COMPANY

Analysis of Hours and Pay of Two Firemen Beginning Watches, March 1-1928, 6:30 a.m.; "A" on 12-24 Hour Basis and "B", the Other, on 8-16 Hour Basis.

12-24 man "A" No. of 12-hr. watches		Total Hours	8-16 man "B" No. of 8-hr. watches	Total Hours.
March	21	252	27	216
April	20	240	26	208
May	20	240	26	208
June	20	240	26	208
July	21	252	27	216
August	21*	262	26	208
6 months in Suit	123	1476	158	1264

*Last 12-hour watch in Aug. ran into Sept. but paid for as Aug. watch.

DURING THE 6 MONTHS

Each man ("A" and "B") received by semi-monthly pay checks 6 mos. pay at $146.35 (the award rate)...... $878.10

8-16 hr. man's monthly pay—
.7014 per hr. on watch

12-24 hr. man's monthly pay—
.6014 per hr. on watch

BY ADDITIONAL PAY-CHECK DATED

Sept. 30, 1928, the 12-24 hr. man ("A") received...... 157.11

(Arrived at by taking 1476 hrs as
184½ constructive 8-hr. days
x $5.6109 DAILY 8-HR. RATE
— $1035.21 less $878.10 already
paid) $1035.21

(Testimony of Francis Edward Gorman.)

THE 12-24 HOUR "A" MEN HAVE BEEN PAID PRIOR TO SUIT

$1035.21 ÷ 1476 hours = $.7014 per hour or the same rate per hour as the 8-16 "B" men

FORMER "A" EMPLOYEES—ABOVE ILLUSTRATION—NOW SUE FOR

123 watches at 8 hrs. to equal 6 mos. at $146.35 per mo., or	$878.10
and 123 4 hr. overtime periods, or 492 hrs. at $.7014 per hr.	345.09
	$1223.19
Less amount already pd.	1035.21
	$ 187.98

THE AMOUNT THE FORMER "A" MEN NOW SUE FOR PLUS THAT ALREADY PAID EQUALS

$123.19 ÷ 1476 hrs. = $.8287 per hour — as against the 8-16 hr. man — $.7014 or an 18 + % differential in favor of the 12-24 hr. men, thus creating an inequality in favor of the former 12-24 hour "A" men and against the former 8-16 hour "B" men.

[308]

The effect of the additional pay check in the case of the 12 and 24 hour man was to raise the amount he received per hour to exactly the same amount that the 8 and 16 hour man had received by his monthly pay check. This was 70.14 cents per hour.

If each day were treated as a unit, as the men sue for in this case, this would create an earning for them of 82.87 cents per hour as against the earning of the 8 and 16 hour men of 70.14 cents, or a differential of 18 plus per cent in favor of the

(Testimony of Francis Edward Gorman.)

men who worked during that 6 months on the 12 hour shifts. I had nothing to do with the issuance of the pay checks. I merely made the payroll.

In the regular course of business during a month, if a man should be underpaid in his check, he would come to the office, or he would make out one of the regular forms and send it to the office, and we would check his time and if the claim was just we would either let him have a voucher or just put it on his next pay check, to suit his own desire.

This has not been done on any wholesale basis, but in individual cases, where a man claims there has been an underpayment.

PLAINTIFF'S EXHIBIT 13 is shown to the witness. In practice it is used if the employe feels that he is underpaid. When we receive the form we check it and if the claim is just, we allow the man his claim. There is never any hesitation about making that adjustment. He is not necessarily required to fill out one of these forms when he comes to the office. There were cases where I would check it while the man was at the window and if I found it was a just claim, we would adjust it verbally.

I did not issue the check. I would give it to the head timekeeper and he would issue the voucher, if the man made his regular request for a voucher. [309]

In making out the payroll on which the September, 1928, checks were based, I followed in all cases the formula prescribed by Mr. Hancock, De-

(Testimony of Francis Edward Gorman.)

fendants' Exhibit A, and each man's time was figured month by month. That resulted in giving the 12 and 24 hour men, for each hour they worked during that 6 months' period, the same rate of pay that was paid the 8-hour men for each hour they worked during that same period.

On Cross examination

Mr. Gorman testified as follows:

> The purpose of that formula, as I understand it, was to give the men who had worked on 12-hour watches the same daily or hourly rate of pay as the men who had been on 8-hour watches. The man was allowed one and a half 8-hour days for each 12 hour watch, but those hours and days were aggregated or lumped month by month.

If a man worked five 12-hour shifts the first week of the month and five 12-hour shifts the second week of the month, and four 12-hour shifts the third week of the month and five 12-hour shifts the fourth week of the month, we lumped those hours for the month and divided by eight to get an equivalent number of [310] 8-hour days. We would have to lump the hours by the month and divide by 8, in order to get under the formula the equivalent number of 8-hour days.

In the case of Mr. Costa, he worked during the month of March, 1928, 21 watches at 12 hours each,

(Testimony of Francis Edward Gorman.)

or an aggregate of 252 hours for that month. I lumped the 21 watches into 252 hours, divided by 8 and got the equivalent of 31-1/2 days worked that month. I did not use the same formula, but I got the same result.

I lumped by days instead of hours and that lumping process gave an equivalent therefore of 31-1/2 8-hour days. Having by Mr. Hancock's formula arrived at a lump equivalent of 31-1/2 days, the man was paid by giving him the equivalent of 70.14 cents per hour or $5.6109 per day. Under that formula, to figure out what the man should have been paid, you get the same result whether you take the lumped 252 hours and multiply by 70.14 cents, or the equivalent number of 8-hour days, 31-1/2, multiplied by 5.6109. It should figure exactly the same. The formula could be worked out either by lumping the hours per month and multiplying by 70.14 cents, or by lumping the hours and dividing by 8 and getting the equivalent number of 8-hour days and multiplying that by the daily rate. It would be the same except for a fraction of a penny. In figuring what the man should have had during this period, we disregard the day as a unit and the week as a unit, but lump the hours by the month to get at our 31-1/2 days for the month, for a man working his full assignment. In the case of Mr. Costa, to figure what he should have received, we disregard the number of days he worked each month, the number of hours he worked each

(Testimony of Francis Edward Gorman.)
day, the number of hours he worked by the week, but took for the basis of our calculation the lumped hours per month, according to the assignment. [311]

In the case of Mr. Costa you have 252 lumped hours. You divide that by 8 and get the theoretical basis of 31-1/2 eight hour days. He worked 21 twelve hour watches or the equivalent of 31-1/2 eight hour days, if you were to bring it to the 8-hour day basis. In figuring by Mr. Hancock's formula, instead of getting your overtime by the day, we adopted a formula which gave us a theoretical basis of 8-hour days. This would give 31-1/2 eight hour days a month.

We were not attempting to find out under this formula how much overtime each day the man worked. All we were trying to get at was the equivalent number of theoretical 8-hour days he worked during the month, and adjusted it according to the rate of the 8-hour man.

Q. You were not making any attempt at all by your formula to find out how much overtime by the day the man was entitled to?

A. Well, the difference between what he was paid—for instance, a 12-hour day we pay them for 12 hours, or one and a half 8-hour days at the existing 12-hour rate at that time, and for each day the man worked he would be allowed the difference between 8 and 12 hour watch rate. In other individual cases, where some man

(Testimony of Francis Edward Gorman.)

may have only worked one or two 12-hour watches, and he was allowed—if it was the case of one 12-hour watch that would be one and a half 8-hour days,—he was allowed the difference between the rate paid him on the 12-hour basis and what it would have equaled on the 8-hour basis."

I had nothing to do with the preparation of the formula which Mr. Hancock gave me to work on. That came to us in the regular manner from the general office. My sole purpose was to comply with that formula. I was not concerned at all as to whether or not it complied with the agreement between the parties. I figured my superior officer should know what he is doing, and I must accept his formula. He is the authority in charge. I am just one of the employes. [312]

Q. Now, you spoke a little while ago about the practice of your company in making adjustments on checks during the time you were with the company, and whether or not they filled out this form. Did you ever refuse to make a correction where one of these was presented, stating that the check recites it was in full for that particular period——

A. I had nothing to do with the issuance of checks. If a man came in and told me he was 8 hours short or 12 hours short or whatever the case would be, I would check his claim and if I could find he had been paid in error I would allow the

(Testimony of Francis Edward Gorman.)

adjustment, as I have [313] stated. If he wanted it on a time voucher, he was allowed a time voucher. If he wanted to let it go on his next check we put it on his next check.

Q. It was never the practice to tell the man "We don't care whether you are right or wrong; you cashed the check and you are through"?

A. We can't do that.

Q. You never did at any time while you were with the company?

A. I can't do it. I am not allowed to.

Q. And you don't know of a single instance where it was done?

A. Not to my knowledge, that I can recall.

Here was received in evidence PLAINTIFFS' EXHIBIT No. 14.

FRANCIS EDWARD GORMAN

was recalled for re-direct examination and discussed the case of a fireman working only one 12-hour watch in any one month.

For instance, Conrad Anderson, No. 2, in the month of August for the 12-hour watch he worked received $6.97. That was paid him on the basis of one and one-half 8-hour days at $4.646 and a fraction—he was given one and a half days, which would be the equivalent of $6.97. When we made the adjustment he was given one and a half days at the

(Testimony of Francis Edward Gorman.)
8-hour rate, $8.41, which would be one and one-half days at the 8-hour rate, and what he received was subtracted from it, or he received a differential of $1.44.

In response to a question from the Court the witness replied that it was for 12 hours work and that he actually worked 12 hours. When he originally worked the 12 hours, the 12-hour watch, he was paid $6.97, which was one and a half times the 12-hour rate.

When it was re-adjusted he was paid $8.41 which was one and a half times the 8-hour rate. If he had worked 8 hours he would have received $5.61. Then he worked four hours additional. When the adjustment was made he received the equivalent of $8.41.

If a man worked for 8 hours under the 8-hour basis he would [314] receive $5.61. For the 4 hours additional he should get approximately $2.80.

Q. Well, suppose that he only worked one day, what would you pay him?

A. Before the adjustment or afterwards?

Q. After the adjustment.

A. $8.41.

Q. And if he worked other days in that month that amount would be lessened for that day. Is that so?

A. No, he would receive an adjustment to equal the $8.41.

(Testimony of Francis Edward Gorman.)

THE COURT: I don't understand that adjustment. I don't understand how you arrive at it all. I can not see it.

By this adjustment he got all together exactly what the 8-hour man got had he worked 8 hours straight time and 4 hours overtime.

THE COURT: Maybe after I think about it a while I will see it. If has been difficult for me to see the method of computing the amount these men received for overtime, the amount they should be paid for overtime. When a man works 12 hours a day and 4 of it is overtime, I would say he would be entitled to overtime on the basis of four times 7014 and that would be $2.80 per day for overtime.

THE COURT: Q. You say he actually receives—

A. $8.41 in the adjustment.

Q. For every day that he works?

A. For every 12 hour day?

Q. Yes.

A. Yes, sir. The adjustment took care of that when the back pay was figured.

Q. And he would receive that $8.41 if he worked a single day, but what would he have received if he worked 30 days a month for every day's work?

A. Every 12-hour watch he would receive $8.41.

Mr. BOOTH: Q. You are speaking now of a fireman? [315]

A. Of a fireman.

Q. And you are applying the ten dollar increase that was given by the Board of Arbitration? That

(Testimony of Francis Edward Gorman.)

is included. That is the $146.35 rate that shows on the board (referring to figures on the courtroom blackboard).

Q. And the fireman's rate on this basis, on the basis of this award by the Board of Arbitration, which increased the then salary by ten dollars a month, amounted to 70.14 cents per hour?

A. Correct.

Q. And when this man that you mentioned, No. 2 on Exhibit 8-A, worked only 12 hours that month, he received prior to the adjustment $6.97 in his regular pay check, regular monthly pay check?

A. He did.

Q. And then when you came to adjust it you paid him an additional $1.44 which brought his total earnings for that day up to $8.41?

A. That is correct.

Q. Which is 12 times 70.14 cents.

A. That is correct.

Q. And was exactly the same as though he had been an 8-hour man and had worked 8 hours and 4 hours overtime?

A. That is correct.

On Re-cross examination

the witness testified that Conrad Anderson was paid one twenty-first of the monthly rate for the one assignment he worked or $6.97.

Four hours overtime is approximately $2.80. This added to $6.97 makes $9.77. Mr. Anderson was not

(Testimony of Francis Edward Gorman.)

paid $9.77 but $8.41, making a difference of $1.36 between the method followed by the company and that contended for by the men.

Mr. BOOTH: If the Court please, with regard to the Northwestern Pacific, counsel has accepted as Exhibit 8-B, a copy of the table which was attached to the Northwestern Pacific answer in the state case. The formula followed was exactly the same and if [316] counsel will stipulate to that I won't put on any evidence in regard to the Northwestern Pacific.

Mr. SHARP: If counsel tells me that it is true, I will accept his statement and stipulate to it.

CLYDE W. DEAL

was recalled as a witness on behalf of plaintiffs.

In the case of the company, in order to arrive at certain conclusions they have denied first the existence of an 8-hour day, and, second, created a theoretical 8-hour day.

The fact that they denied the existence of the 8-hour day is easily seen, because all hours worked in excess of the 8-hour day, under the rule, must be repaid for as overtime. The fact that they tried to hold on—they created the theoretical 8-hour day, is easily proven because they take overtime and transmute it into theoretical 8-hour days. That is,

(Testimony of Clyde W. Deal.)
they take the time in excess of 8 hours on the 12-hour watches, lump it to make 8-hour days out of it.

This trouble started as a result of the award handed down October 31st. There was an agreement to arbitrate specific questions. The specific question was, Should the 8-hour watch and the 12-hour watch continue in the rules, or shall the 12-hour watch be stricken from the rules? That was the specific question before the Arbitration Board; and for 122 days, 4,000 pages of transcript, that question, along with the other two questions, was considered by the Board, headed by Dr. Marks of Stanford University. The Board says that the 12-hour watch is abolished as of November 1, 1927, because we had agreed, that is, the Southern Pacific Company and the other companies concerned, and the Union, that the first of the month following the date of the award the new hour rule, if there was any, that is, the award would be effective as far as the hours [317] were concerned. However, instead of putting the award into effect the company went to your court and applied—and, incidentally, if I may be pardoned for going back just a moment—during the deliberations of the Arbitration Board, in spite of the fact that there was only three questions involved—

In spite of the fact that there was only three questions before the Board, and one of the principal questions is our question, Shall the 12-hour watch remain or shall it be abolished?—and in spite of the

(Testimony of Clyde W. Deal.)
fact that we had agreed, that is, the company and the Union, that the question before the Board would be limited, in the agreement, the company attempted and did introduce other questions, setting up and pleading for split watches and 9 and 10 hour watches and other combinations that were not proper before the Board at all. The board considered all the questions, so it said in the award, all matters presented to it, and handed down its opinion and decision. Then on a technicality that the Board had not considered everything, it was alleged by the attorneys for the company that the Board had not considered everything presented to it properly, and the company went to the courts, your court by the way, first, I believe and attempted to impeach the award. Then as the records plainly show, finally the award was sustained by the Circuit Court, but before that happened, while it was still being considered on appeal, there was several conferences, to which Mr. Hancock referred in regard to this matter and in regard to other matters not relating to us at all, but we were all in the conference with Mr. Hancock and other representatives of the carriers, and finally—I don't want to burden the record, your Honor, but I would like to tell this story — and finally we felt — when I say "we" I mean the men that I represent — that we were in a position — we had carried on a sustained fight for a long time — that we had to trade for the proposal that was

(Testimony of Clyde W. Deal.)

finally made, and we had to [318] trade for 4 months of the effect of that award to the 12-hour men in exchange for the ten dollar increase being put into effect and being withdrawn from the court. In other words, the hours were supposed to go into effect November 1st, and finally by agreement swapping something we were entitled to by the award and entitled to by the agreement with the companies for something else that we had by the award, that is, the ten dollar increase per month. We advanced the effective date from November 1st to March 1st, of the hour rule. That was done; whether right or wrong, we did it. That amounted to $50,000 to our members.

During the discussion of that I remember quite well that I pointed out to Mr. Hancock and others the accumulating overtime that was continuing to accumulate, and during that discussion I think is the time Mr. Hancock got the impression that we were going to take our position that all time in excess of 8 hours was overtime and should be paid as overtime. The entire purpose was to get the matter out of court, so far as I was concerned. and to get the award into effect.

In May the agreement was arrived at advancing the effective date to March 1st from November 1st. Finally, I believe it was in August or the first part of September, a decision was handed down by the Circuit Court and by the judges of this court. At

(Testimony of Clyde W. Deal.)

that time we were not consulted, even though we had been consulted many times previously in methods of how to figure out changed rules and so on. But this method was devised and put into effect without consulting the organization or without consulting the attorneys.

In so far as the statement that was made that the additional wording was placed on the check by the company in order to defeat our purpose, I wish to state that there was nothing placed on those checks other than has been placed on checks many times in similar circumstances. For instance, in 1919 there was back pay [319] due our members, from January 1st for about 5 or 6 months, and those back pay checks had notations on them somewhat similar—maybe not just exactly like that, because it was a different Board and a different set-up, but they had notations on them of additional compensation. In 1917, I believe, also back pay checks were paid and notations were made on them. In fact, it is the custom where there has been arbitrations handed down, or there has been retroactive pay paid, that notations will be made on them showing what it is for. That is a railroad custom, as long as I have known anything about it, and I am sure Mr. Hancock did not mean it, or he just forgot for the moment and he inferred that this was a particular statement put on that check in an effort to defeat anything we thought we were legitimately entitled to.

(Testimony of Clyde W. Deal.)

The method of computing the check as employed by the company, so far as the arithmetic is concerned, is undoubtedly correct, but the confusing part of it is that it is based on a false premise. As I have said, from the beginning, there was only one question in regard to hours, Shall the 12-hour watch remain in the rules or should it be abolished? And as of March 1st it was abolished. That was the second time we had agreed it should be abolished, first on November 1st, according to the arbitration and according to the agreement setting up the Arbitration Board, and March 1st we agreed it was effective, the award was effective, and the 12-hour watch no longer existed. If the 12-hour watch did not exist then there was only one watch and that was the 8-hour watch.

Now, in order to avoid the payment of overtime, from 8 to 12, they say, in effect, that there is no 8-hour watch. Then, in order to carry out the vice they set up a theoretical 8-hour watch.

The 6 day week is referred to as contingent upon the payment [320] of overtime. The overtime rule then in effect was, overtime shall be computed on the actual minute basis. Even hours will be paid for at the end of each pay period; fractions thereof will be carried forward. That was for computing overtime, all time in excess of the regular assigned hours. After March 1st there were no regular assigned hours except the 8 hours.

(Testimony of Clyde W. Deal.)

Rule 11 is computing overtime. The purpose of the difficulty between the men, the representatives of the Union and the company, was to abolish the 12-hour watch—was the 12-hour watch, rather, and for many years the men working 12-hour watches had been paid a less rate than the 8-hour men. However, that fact was not the real fact before the Arbitration Board, but the fact, the question before the Board was the abolishment of it, the 12-hour watch.

The method of computing time, as shown on the blackboard, I must confess, is new to me, though I thought I knew all the methods there were in computing time.

The statement is made that the overtime rate was the same as the straight time rate. Still, following this method here, your 30-day month, 31-day month, we get a different rate for 8 hours per hour, and that is easily noticeable. I think there was one shown this morning of $4.84 or $4.85 for 8 hours, and this other one of 4.64. There is only one overtime rate, sir, and that is 70.14 cents per hour. And any statement that this method can be employed and the same rate paid at the same time is in error, for overtime. My statement that that is the only way of doing it is based on rule 8 of the agreement pertaining to overtime which provides that the monthly salary now paid the employes covered by this agreement, shall cover the present recognized straight

(Testimony of Clyde W. Deal.)

time assignments. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the [321] monthly salary at the pro rata rate.

There was only one "present recognized straight time assignment" on and after March 1, 1928, and that was the 8-hours.

Fixing overtime rate. Rule 9. To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment. Then, on 8 and 16 hour watches, divide 12 times the monthly salary by 2504; and on and after March 1st there was only the 8 and 16 hour watches. 2504 into 12 times 146.35 gives you 70.14 cents per hour. That is one thing that has been done correctly. That is, they have arrived at that rate correctly. However, they failed to use it properly. The balance of the rule, which refers to the 12 and 24 hour watches, was abolished as of March 1, 1928.

It is difficult for anyone that has been living with this so long to argue or to try to give evidence to explain a thing that is so obvious, to me.

I say it is difficult to try to argue the merits of a method of computing time, or to try and argue the method against a method that is based on something that does not exist. And that is the whole fallacy, for the regular straight assignments as of March 1st was supposed to be 8 hours. The company

(Testimony of Clyde W. Deal.)

did not assign them, I assume on the assumption that they might be eventually upheld by the Circuit Court of Appeals and defeat the purpose of the award that had been filed in the courts.

However, on and after March 1st, there was only one condition that was supposed to be in effect. The fact that the men were not assigned to 8-hour watches was not our fault. The men worked every watch that they were assigned to and they were paid a monthly wage, not a daily and hourly wage, it was a monthly, fixed monthly rate of pay. There was one rate for overtime. The [322] failure of the company to assign them was for the purpose of the company, not for any other purpose than the hope maybe that they would finally defeat the award in the courts. They failed, they lost the fight, they were ordered to put the award into effect, and then this device is for the purpose of defeating the attempts of the men to collect the overtime after 8 hours, in the form of overtime, by changing it into theoretical 8-hour days.

In making those computations Mr. Gorman referred to parts of the rule or the agreement which were no longer in effect as of March 1, 1928.

First was section (a) of Rule 6, which was the 12-hour watch, which was specifically abolished. Then section (b) of Rule 9, which relates to the fixing of the overtime rate, and says that on 12 and 24 hour watches divide 12 times the monthly salary by 2920.

(Testimony of Clyde W. Deal.)
Now, 2920 is eight times 365. He may or may not have relied on that. Of course, Mr. Gorman relied on the formula and the formula was based upon the theory that they could take a 12-hour watch and make 8-hour days out of it, which the rule does not permit. It is true, however, that in a statement of this agreement, at one time, we agreed with the company that for every 12-hour watch they would pay 1 and a half days' pay. Now, we had to do that at one time. That was in 1926. The agreement was dated May 1, 1926. It was in effect, I think, until the 12-hour rule was struck out.

The purpose of that was made necessary on our part because of a practice that originated prior to that time on alleged 12-hour watches, or so-called 12-hour watches, of paying 8 hours or a day for the first 8 hours, and the balance of it in the form of overtime. The company did that for quite a number of years. For instance on a certain route the men would be assigned to 11 hours and 45 minutes or 11 hours and 15 minutes on one watch and 12 hours [323] and 15 minutes or 12 hours and 45 minutes on the other watch. The theory was that they were supposed to equalize in the revolving 12 on and 24 off. But in actual practice it did not always equalize, and certain men were only able to get a monthly salary because the company computed it as eight hours, one day, and $3.45, $3.30 or

(Testimony of Clyde W. Deal.)

$3.15 overtime. They did that for quite some time until we in 1926 arrived at this agreement and understanding. They got their month's wage in theory, so the company said, for the first 8 hours. The balance of it was overtime but they did not get any more than their monthly wage.

I participated in the argument made before the Arbitration Board and know the points urged by the Union in support of the contention that the 12 hour watches should be abolished.

The main contention we made was that the 12-hour watch was a relic, an antique, that it should be as a matter of principle retired to the garret. But we supported that, of course, with the argument that it was a danger to life and property, to the men on watch for 12 hours, where you have three or four thousand passengers quite often on a vessel, and the potential danger there of keeping men on such long watches, also the hardship caused as a result of working long hours. In principle, those were the main arguments that were used.

When the company issued checks in the form, a sample of which is before the court, many of the men took up with me the question of cashing the checks.

Q. And what did you do or say to them?

A. I told them to cash them, because——

Mr. BOOTH: We object to that as not binding upon the defendants here, not having

(Testimony of Clyde W. Deal.)

been stated to them. We raised the defense of the checks being tendered in full paymnt of this account, and they have been acknowledged on the back in full payment of account. Now, I think it is obvious, under the decisions, what Mr. Deal, manager of the Union, said to his men in regard to the men cashing them, that was not communicated to us. I object to this on the ground [324] that it is incompetent, irrelevant and immaterial.

Mr. SHARP: I want to show the exact situation. There was some point made by Mr. Booth, why they happen to use these forms, and I want to bring out by this witness, if I may, that after taking it up with me he was advised that was not necessary, that he could proceed and tell the men to cash them and let the attorneys take up any controversy afterwards and explain the full situation. [325]

Mr. BOOTH: We object to the relevancy of the statement of counsel. Counsel introduced these forms and I asked him if any of these forms were ever presented to the company and he said "No".

The COURT: Objection sustained.

I have been representing the union for 16 years. I am the executive officer of the Union. I handle the claims of the men against the company where there is any claim that checks have not been issued for the full amount. I think I have handled several hundred of such claims in the last 16 years.

(Testimony of Clyde W. Deal.)

I have taken up claims with the Southern Pacific Company possibly first with Captain Heath and then with Mr. Hancock. There is a certain method of handling all those cases. I am familiar with the form of check that has been in use by the Southern Pacific during this period.

To the best of my knowledge the statement on the back of the check, Defendants' Exhibit B, "This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within" has been there for the last 16 years. It was on the back of the checks regarding which I handled claims.

Mr. SHARP: Now in any of those cases was objection made to the treatment of the claim on the ground that the check was endorsed in full?

Mr. BOOTH: If the Court please, I want to interpose an objection here. Probably it will be argued later. But I object to any evidence as to the custom or practice of the company waiving the benefit of any release on the back of these checks, as irrelevant and immaterial. The fact that a man makes a practice of waiving the statute of limitations in cases, sometimes because it is a matter of good business judgment or comity or good salesmanship, is no bar to his setting up the statute of limitations when it is properly pleaded, and when it is relied on by him and not waived. It is not a question of [326] estoppel in pais; this is a

(Testimony of Clyde W. Deal.)

question of special checks and checks in a special form being issued, and the parties signing them and cashing them, and I think we are entitled to rely on this even though we may have waived that in the past as to other checks and other forms of payment.

Mr. SHARP: If the Court please, our contention in this regard would be that over a period of 16 years this identical form of alleged receipt in full has been used; that the men have for years come to rely on the fact that they can cash their check and get their bread and butter each payday without having to hold the checks up while the lawyers and accounting departments decide on the question of whether or not that is a receipt for payment in full. That has been the uniform procedure; they cashed their pay checks, paid their bills, and live on it, and if there are any discrepancies it is straightened out thereafter. That has been the practice that has continued in years past, and the men took the checks and cashed them, because they knew if there was any discrepancy it could be straightened out afterwards with the company.

The COURT: Isn't there evidence in the record already as to that condition obtaining, Mr. Booth? I think some evidence went in without objection.

Mr. BOOTH: Yes, there is evidence that where time has been omitted from the paycheck this form

(Testimony of Clyde W. Deal.)

was used and the mistake was rectified. But I do not think that precludes the company from raising the defense, and I think it is not relevant to any claim that the defense has been waived in a wholesale case such as this, where the company puts a special endorsement on the checks and issues them in the face of a prior claim that more money is or may be due and the checks are cashed. We have a peculiar situation which I think is not disposed of by prior practice. I was perfectly willing to admit what the prior practice is. If a mistake is made in a pay check of [327] any man in the Southern Pacific Company, if he is not credited with enough miles or enough hours, or if a watch is omitted, why, it is always corrected.

The COURT: No matter what the endorsement is.

Mr. BOOTH: No matter what the endorsement is on the back of the check. But here is a special situation, and the check is issued in anticipation, as Mr. Hancock testifies to. Now we shall contend on the argument that that can not impair it to any extent by practice in the ordinary course of business. I think any public service corporation, or any other employer, would be, and justly, subject to very severe criticism if it relied on the endorsement of a check, no matter what the language was, if they attempted to preclude a man from opening the account and showing he had not been paid in full.

(Testimony of Clyde W. Deal.)

The COURT: The language here referred to is written on the face of the check?

Mr. BOOTH: Yes.

Mr. SHARP: There is no language on the face of the check which purports to be in full settlement. The language on the face of the check is "For additional compensation account".

Mr. BOOTH: It says "For additional compensation on account of this award". "For additional compensation account of Arbitration Award between Southern Pacific Company and Ferryboatmen's Union, October 31, 1927, from March to August, 1928, inclusive."

Mr. SHARP: That is the only new language used.

Mr. BOOTH: And on the back of the check was the endorsement "This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within".

The COURT: Now, Mr. Sharp, you are seeking to show by this witness what?

Mr. SHARP: I am seeking to show by this witness that as a matter of [328] fact, for many years, regardless of that statement on the back of the check, that the check was in full of account, it has been the uniform practice to permit the men to come in and get adjustments afterwards.

The COURT: As I understand it, that is already in evidence before the Court, and Mr. Booth stated that that is the fact.

(Testimony of Clyde W. Deal.)

Mr. SHARP: Then what is the objection to the question? I want to go on from that and show it has applied to not only a single case, but wholesale cases.

The COURT: You want to show it applies particularly to this check?

Mr. SHARP: I want to show also with respect to these particular checks, that no objection was made at that time because upon legal advice, in view of this past practice, I informed them to go ahead and cash the checks. I want to bring that evidence before the Court.

Mr. BOOTH: We object to it as incompetent, irrelevant and immaterial and not communicated to the defendants.

The COURT: Sustained.

Mr. SHARP: Exception.

During the various occasions on which I presented on behalf of the members of the Union claims for corrections in checks. there was never any objection made on the ground that we had not used the particular form in evidence here as plaintiffs' Exhibit 14. In other words, adjustments were made whether we used the form or not, contingent on being able to convince the company that there were mistakes made.

Q. Did you hear this part of Mr. Hancock's testimony yesterday: "Well, then disregarding any case covered by special agreement and disregarding

(Testimony of Clyde W. Deal.)

cases covered by the exceptions to the rules, it has been the uniform rule and practice since 1918 to date that where a man is assigned on an 8-hour watch but, as a matter of fact, on any particular day he works in excess of 8 hours, he is entitled to [329] overtime for that excess at a prorate basis.

Mr. BOOTH: That is the regular assignment?

Mr. SHARP: Yes.

The WITNESS: Eight regular assigned watches?

Mr. BOOTH: Yes.

The WITNESS: Yes. That would be correct.

Mr. SHARP: Q. What has been the uniform rule and practice from 1918 to date?

A. Well, that was established in Recommendation 82. If a man's regular assigned hours was 8 hours and he worked in excess of that, unless it was provided for in an agreement he would receive overtime.

Q. At a prorate basis?

A. At at a prorate, yes.

Q. And that was since 1918 you say?

A. I beg pardon?

Q. The year that started was 1918?

A. 1918".

Did you hear the testimony?

A. I did.

Q. Do you disagree with Mr. Hancock's interpretation as to what overtime consists of under the agreement?

(Testimony of Clyde W. Deal.)

A. I agree with his testimony there that all time in excess of 8 hours is overtime and should be paid for as such.

Q. Has the contention ever been made by the Union or by you with respect to overtime other than that set forth by Mr. Hancock?

A. There has not.

Q. So there has been during this entire period complete agreement between the Union and the company as to what constitutes overtime. Has there ever been, since 1918, any difference between the Union and the company as to the meaning of overtime?

A. Not to my knowledge.

Q. Or of the rules requiring overtime—

A. There have been differences as to how much should be paid. But what constituted overtime, there has been no difference.

Q. And there has been since 1918, therefore, complete agreement between the Union and the company that overtime meant just [330] exactly what Mr. Hancock testified yesterday was overtime?

A. That is correct.

On Cross-examination,

Mr. Deal testified as follows:

Leaving out the question of overtime entirely this 12-hour man would receive the same monthly salary for 21 eight-hour days as the 8 and 16 hour man would receive for 26 or 27 eight-hour days.

(Testimony of Clyde W. Deal.)

The effect of our claim is to give the men a month's wages for the assigned hours made by the company. It would pay them for overtime, the regular overtime rate for all time in excess of 8 hours.

70.14 is the overtime rate per hour. The only time it is used is in computing overtime. That rate was derived solely for the purpose of overtime.

There might be quite a bit of difference between the man getting 8 hours straight time and 4 hours overtime on the basis of 70.14 cents per hour than a man getting 12 hours' time on the same basis.

There is a man subject to the assignment of the company, they assign him to 12-hour watches throughout the month, for which he gets his regular monthly wage. By agreement and court order he was put on eight hours as of March 1st and the judgment says all time [331] in excess of 8 hours is overtime. There isn't any rule in the award or in the agreement after March 1st that can justify you in figuring time by this method.

I take the position in this case that because of the failure of the company to put into effect the award on November 1st, and if there is any inequalities or any trouble following it is not our fault, and if you did not see fit to assign the man they were on monthly wage. You assigned them so many watches per month for which they were paid the monthly wage. Now, all time over 8 hours was overtime. That is all there is to it.

(Testimony of Clyde W. Deal.)

The award changed the overtime rule by eliminating the 12-hour watch.

The point is Rule 8 is the only present recognized straight time assignment and that was eight hours. There was no 12-hour assignment. 12 hours was not regularly recognized as a straight time assignment after March 1st.

We are contending that you assigned these men to 12-hour watches. They are entitled to their monthly wage for their regular assignments, and we are contending that all time in excess of 8 hours was overtime.

In practically all cases the men who had 12-hour watches had bid for them. When November 1st came the company should have changed its whole system to the 8-hour basis.

The 12 and 24 hour boats kept running until about September 1st. The company assigned the watches. The men either had to work on them or not work. There were no 12-hour watches after March 1st. Our position is that for each 12 hour period worked after March 1st that 8 hours should be treated as one day's work and that for those assignments he should be paid a monthly salary. He should be paid a monthly salary for 20 eight-hour watches when the 8 and 16 hour men were working 26 eight-hour days. [332]

Monday, September 24, 1934.

Mr. BOOTH: We ask counsel to stipulate that the term "broken assignment" as used in the note to Rule 2 of the contract of 1925, plaintiff's Exhibit Number 2, means a case where an employe on a regularly assigned crew, as defined in Paragraph (a) and/or (b), of Rule 6 of that agreement, failed to work continuously throughout the calendar month on the entire series of watches which were included in the regular monthly assignment of watches for that month for the regular assigned crew of which he was a member.

Mr. SHARP: Now, may I add at that point; Counsel's statement is correct, with two limitations. The term "broken assignment" covers the situation where a man did not work all of the assignments which the company assigned him to. Now, the reason I make that limitation is, I do not want counsel to argue afterwards that the situation here involved, where the men worked all the assignments the company actually assigned them to, is a situation of broken assignments. Our contention in that regard is, if the company assigned the men to work on 20 or 21 watches a month, that was a full assignment and not a broken assignment, but with that limitation, which is that where a man fails to work voluntarily, or fails to work less than the full number of watches assigned by the company, that is designated in the agreement as "broken assignments".

The second limitation which I want to make with respect to that is this: It is self-evident, but I want

to be sure there is no misunderstanding. The term "broken assignment" as stated in counsel's requested stipulation, refers to Rule 6 (a) and/or Rule 6 (b). Of course, it is the contention of the Union that as of March 1, 1927, there was not any "(b)" part to the rule at all, and that the only rule in existence as of that date is the one calling for eight-hour watches. So we do not want to be deemed to be [333] stipulating that a man working on a twelve-hour watch came within the rule, because there was no such rule. But I think that gives counsel what he asks for.

F. E. GORMAN

recalled as a witness for the defendants testified as follows:

I have all the payrolls of the Steamer Division from the latter part of 1923 to the latter part of 1930. They include the men who have been made the subject of the testimony in this case.

Mr. BOOTH: Mr. Sharp, I find there is no proof in here, either by you or by us, that the Northwestern Pacific contract was the same, or substantially the same, as the Southern Pacific contract. A copy of that Northwestern Pacific contract was attached to the Northwestern Pacific answers, and I would like to ask for a stipulation, subject to correction, that the copy set forth in the answer is correct.

(Testimony of F. E. Gorman.)

Mr. SHARP: I am satisfied, if you state that is a correct copy itself. Mr. Deal tells me, however, that he is not sure whether there were any supplementary agreements with respect to the Northwestern Pacific, as there was in connection with the Southern Pacific.

Mr. Gorman went on to testify as to broken assignments.

Mr. BOOTH: Q. Mr. Gorman, when a man on an 8 and 16 hour watch or a 12 and 24 hour watch, worked on any one or more watches less than the full number of assigned watches for that month, it has been stipulated here that that is regarded as a broken assignment. Is that the manner in which the payrolls were prepared?

A. Yes, sir, on the broken assignment basis.

Q. Now, when a man worked on all the assigned watches during the month, but on one or more watches he voluntarily worked less than the 8 or 12 hours prescribed for that watch, was that regarded as [334] a broken assignment? I do not refer to a case where the company itself laid up a boat short of the full eight hours.

A. If he did not fulfill his full series, why, it was a broken assignment.

Q. Suppose on a 21-watch assignment, a man worked twenty full twelve hour watches, and one watch, voluntarily, of ten hours, was that regarded as a broken assignment?

A. Yes, sir.

(Testimony of F. E. Gorman.)

Q. Were the payrolls made up on that basis?

A. Yes, sir.

Q. In the case of a broken assignment where less than the full number of watches were worked, was the man paid by the day?

A. Yes, sir.

Q. The agreement of 1925 provides, in Rule 2, for a method of ascertaining the daily pay. Now, was that, in practice, modified by an interpretation issued by Mr. Hancock on May 1st, 1926?

A. Yes; that was modified by Mr. Hancock's interpretation.

Mr. BOOTH: I have here a copy of that memorandum, which is initialed as I understand it, by Mr. Deal, and I would like to put it in. It is our file copy. I would like to have it copied in the record. It is very long, and I do not think it is necessary to read it in full at this time.

Mr. SHARP: I would like to have it in as an exhibit, instead of putting it in the record.

Mr. BOOTH: It has Mr. Deal's initials on it.

Mr. SHARP: Mr. Deal tells me he did initial a copy.

Mr. BOOTH: Q. Under this interpretation of May 1st, 1926, when an 8-hour man worked a broken assignment, how did you arrive at the daily rate of pay?

A. We took the number of days his crew would work in the month and divide that into his monthly

(Testimony of F. E. Gorman.)
salary and establish a daily rate of pay for an eight hour day. [335]

Q. When a man on a 12-hour assigned watch worked less than the required number of watches, under this interpretation, how did you arrive at his daily rate of pay?

A. If he was on a 21-watch assignment, we would divide 31-1/2 into the monthly rate and would then obtain an eight-hour rate of pay and we would pay him 1½ days at the 8-hour rate of pay.

Q. At the 8-hour rate of pay on the 12-hour basis.

A. Twelve hour basis, yes.

Q. And if he worked on a 20-watch assignment, was the same method followed?

A. The same method; only we would use 30 as the divisor.

Q. Was this memorandum of May 1, 1926, modified subsequently to change the divisor in the case of any of these 12-hour men, and, if so, how?

A. Yes. The memorandum of May 1st shows that in the case of a 21-watch assignment, you would use a divisor of 1/31st, and on the memorandum of May 25th it corrected that so you would use a divisor of 1/31 and 1/2.

Q. Was that the method that was subsequently followed in making up the payrolls?

A. Yes, sir.

Q. You spoke in your former testimony of men coming in to complain about not being paid enough.

(Testimony of F. E. Gorman.)

Were there ever any complaints, as far as you know, of this method of making up payrolls?

A. None that I can recall. Of course, occasionally, why, a man may come in and state he thought he had been underpaid. We would check with him and if he had been underpaid through some error in our figures, why, we would correct accordingly.

Said interpretation or memorandum was introduced in evidence as Defendants' Exhibit H and is in words and figures as follows: [336]

DEFENDANT'S EXHIBIT H

Memorandum of May 1st, 1926

With Examples "A", "B", "C" and "D"

MEMORANDUM of interpretations covering methods, under varying conditions, of compensating Marine Firemen, Deckhands, Cabin Watchmen and others coming under current Agreement covering employes represented by the Ferryboatmen's Union of California.

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1. Q. Considering the language—

"The monthly salary now paid the employes covered by this Agreement, shall cover the present recognized straight time assignment"

what will constitute the fulfillment of such a straight time assignment?

A. To fulfill such an assignment an employe will serve a series of "8 & 16" hour watches, or a

(Testimony of F. E. Gorman.)

series of "12 & 24" hour watches, under conditions as prescribed in the rules continuously throughout the calendar month.

2. Q. How will an employe be paid who during the calendar month changes, or is changed from a— "8 & 16" hour watch to another "8 & 16" hour watch, "12 & 24" hour watch to another "12 & 24" hour watch, "8 & 16" hour watch to a "12 & 24" hour watch "12 & 24" hour watch to a "8 & 16" hour watch, or makes more than one change during month?

A. Should be paid in accordance with the principles enunciated in Examples "A", "B", "C" or "D", according to circumstances.

3. Q. Where a fireman or deckhand, holding regular assignment as such, serves a part of the month as a licensed deck or engineroom officer, how should he be paid?

A. For services rendered as fireman or deckhand, he should be paid in accordance with Examples "A", "B", "C" or "D".

4. Q. Do the rules provide for the employes involved receiving pay for time off duty?

A. No.

5. Q. How will an employe who works regular "8 & 16" hour watch assignment (with seventh day off without pay) throughout the month, be compensated for extra service, where he works, say [337] two of his regular days off, during the month?

(Testimony of F. E. Gorman.)

A. For such extra service, he should be allowed additional compensation, on daily basis, arrived at in accordance with the provisions of Examples "A", "B", "C" or "D", according to circumstances.

6. Q. How will employes' pay be computed and carried on payrolls for first half of the month?

A. On basis established in Examples "A" to "D" subject to adjustments, in connection with the last half, where employe fulfills straight time assignment.

7. Q. (a) If an employe works a portion of his watch and it becomes necessary to relieve him account of sickness or other causes, how should he be paid for time worked?

A. He should be paid for actual time worked, in accordance with Examples "A" to "D".

(b) How should the relief man be paid (assuming relief man had performed no initial service)?

A. For actual time worked, but with a minimum of four (4) hours.

8. Q. (a) If regular employe is held on duty beyond the hours of his assigned watch, because employe in succeeding watch that is to relieve him is late reporting for duty, who will he be paid?

A. On overtime basis.

(b) How will the tardy (regular) employe be paid?

A. For actual time worked

(c) How will an extra employe (who has performed no initial service) be paid, where used to

(Testimony of F. E. Gorman.)

relieve the regular employe who has worked over into the succeeding watch, because of failure of (regular) employe on such watch to report for duty.

A. For actual time worked, with minimum of four (4) hours

(d) Under rule reading—

> "When notified or called to work outside of established hours, after having been released from duty, employe will be paid a minimum of four (4) hours.

how will service rendered after the expiration of the four hours be paid for?

A. On actual minute basis.

9. Q. What overtime rate, or rates, will be used in connection with the various daily rates as arrived at under Examples "A" to "D" inclusive? [338]

A. Overtime will be paid for on basis of rates arrived at under formulas prescribed by Rule 9 of the Agreement.

10. Q. Are the daily wage rates as shown in Examples "A", "B", and "C" subject to change?

A. Yes, they will be subject to change from time to time, in accordance with decisions of the United States Railroad Labor Board or other tribunal, or by local agreement.

San Francisco, Cal.

May 1, 1926. [339]

EXAMPLE "A"

SHOWING METHOD OF COMPENSATING EMPLOYES WORKING BROKEN ASSIGNMENTS, DURING 31 DAY MONTH, USING MONTH OF MAY, 1926, TO ILLUSTRATE, FOR DECKHAND.

		Watch	Worked	Time		
SAT.	1st	12 & 24	7AM x to x 7PM	1½	days	at $4.1742 or 1/31st.
	2nd	"	7PM x \	1½	"	
	3rd		\ x 7AM			Time allowance
	4th	"	7AM x to x 7PM	1½	"	is credited to
	5th	"	7PM x \	1½	"	the day on which
	6th		\ x 7AM			the watch starts.
	7th	"	7AM x to x 7PM	1½	"	
SAT.	8th	"	7AM x \	1½	"	
	9th		\ x 7AM			
	10th	"	7AM x to x 7PM	1½	"	Total of 12 days
	11th	"	7PM x \	1½	"	at $4.1742
	12th		\ x 7AM			....
	13th	8 & 16	6PM x \	1	"	at $4.9769 or 1/26th
	14th	"	6PM x \ \ x 2AM	1	"	Account Saturday
SAT.	15th	"	DAY OFF \ x 2AM			being the "DAY
	16th	"	6PM x \			OFF"
			\ x 2AM	1	"	on the position, and
	17th	"	6PM x \	1	"	there being 5 Satur-
			\ x 2AM			
	18th	"	6PM x \	1	"	days in the month,
			\ x 2AM			
	19th	"	6PM x \	1	"	leaving 26 working
			\ x 2AM			days
	20th	"	6PM x \	1		
			\ x 2AM			
	21st	"	6PM x \	1	"	Had the "Day Off"
			\ x 2AM			fallen on Tuesday

(Testimony of F. E. Gorman.)

	Watch	Worked				Time
SAT. 22nd	8 & 16	DAY OFF				
23rd	"	6PM x		1		of which there was
			x 2AM			4 in the month,
24th	"	6PM x		1		
			x 2AM			leaving 27 working
25th	"	6PM x		1		days, the rate
			x 2AM			would have been
26th	"	6PM x		1		
			x 2AM			$4.7926 or 1/26th
27th	"	6PM x		1		
			x 2AM			of the monthly wage.

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	Watch	Worked				Time
28th	"	6PM x		1		
			x 2AM			
SAT. 29th	"	DAY OFF				
30th	"	6PM x		1	"	Total of 16 days
			x 2AM			
31st	"	6PM x		1	"	at $4.9769
			x 2AM			

Effective with May 1st, 1926
C.W.D.

[341]

(Testimony of F. E. Gorman.)

EXAMPLE "B"

SHOWING METHOD OF COMPENSATING EMPLOYES WORKING BROKEN ASSIGNMENTS DURING 31 DAY MONTH, USING MONTH OF MAY, 1926, TO ILLUSTRATE FOR DECKHAND.

		Watch	Worked	Time	
SAT.	1st	12 & 24	6PM x╲ to	1½ days	at $4.1742 or 1/31st.
	2nd		╲x 6AM		For 30 day month
					See Example "C"
	3rd	"	6AM x——x 6PM	1½ days	....
	4th	"	6PM x╲	1½ "	
	5th	"	╲x 6AM		For month of
					February daily
					rate would be
	6th	"	6AM x——x 6PM	1½ "	$4.6214 or 1/28th
					on 28-day month,
	7th	"	6PM x╲	1½ "	or $4.4621, i.e.
SAT.	8th	"	╲x 6AM		1/29th, for 29
					day month.
	9th	"	6AM x——x 6PM	1½ "	
	10th	"	6PM x╲	1½ "	
	11th	"	╲x 6AM		Total of 12 days
	12th	"	6AM x——x 6PM	1½ "	at $4.1742
	13th	....	....	....	....
	14th	8 & 16	6AM x to x 2PM	1 day	at $4.9769 or 1/26th
SAT.	15th	DAY OFF			of the monthly
					wage, account Sat-
					urday being the
	16th	"	6AM x--to--x 2PM	1 "	"Day Off" on the
					position, and
	17th	"	6AM x——x 2PM	1 "	there being five
					Saturdays in the
	18th	"	6AM x——x 2PM	1 "	month, leaving 26
					working days.
	19th	"	6AM x——x 2PM	1 "	
	20th	"	6AM x——x 2PM	1 "	For 3-day month
					see Example "C"
	21st	"	6AM x——x 2PM	1 "	

(Testimony of F. E. Gorman.)

		Watch	Worked	Time		
SAT.	22nd	8 & 16	DAY OFF			For month of February (28-day month) 8 & 16 hour watch employe would receive $5.3917 per day, as there would be four (4) days off during the month.
	23rd	”	6AM x——x 2PM	1	”	
	24th	”	6AM x——x 2PM	1	”	
	25th	”	6AM x——x 2PM	1	”	
	26th	”	6AM x——x 2PM	1	”	
	27th	”	6AM x——x 2PM	1	”	
	28th	”	6AM x——x 2PM	1	”	
SAT.	29th	”	DAY OFF			
	30th	”	6AM x——x 2PM	1	”	Total of 15 days at $4.9769
	31st	”	6AM x——x 2PM	1	”	

Effective with
May 1, 1926.
CWD

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(Testimony of F. E. Gorman.)

EXAMPLE "C"

SHOWING METHOD OF COMPENSATING EMPLOYES WORKING BROKEN ASSIGNMENTS DURING 30 DAY MONTH USING APRIL 1926 TO ILLUSTRATE FOR DECKHAND.

	Watch	Worked	Time	
1st	8 & 16	6AM x——to——x 2PM	1	day at $5.1760 or 1/25th of the monthly wage account Friday being the "Day Off" on the position, and there being five Fridays in the month, leaving 25 working days.
FRI. 2nd		DAY OFF		
3rd	"	6AM x——to——x 2PM	1	"
4th	"	6AM x——to——x 2PM	1	"
5th	"	6AM x————x 2PM	1	"
6th	"	6AM x————x 2PM	1	" For 31 day month see Examples "A" and "B"
7th	"	6AM x————x 2PM	1	"
8th	"	6AM x————x 2PM	1	"
FRI. 9th	"	DAY OFF		Total of 8 days at $5.1760 per day.
10th	"	6AM x————x 2PM	1	
11th		....		....
12th	12 & 24	6AM x——to——x 6PM	1½	at $4.3133 or 1/30th April being a 30-day month
13th	"	6PM x—\	1½	
14th		\—x 6AM		
15th	"	6AM x————x 6PM	1½	....
16th	"	6PM x—\	1½	" Time allowance is credited to the day on which the watch starts.
17th	"	\—x 6AM		

(Testimony of F. E. Gorman.)

	Watch	Worked	Time	
18th	12 & 24	6AM x——x 6PM	1½ day	.... Total of 9 days at
19th	”	6PM x——x 6AM	1½ ”	$4.3133 per day
20th	8 & 16	6PM x— —x 2AM	1 ”	At $4.9769 or 1/26th of the monthly wage
WED. 21st		DAY OFF		account Wednesday being the “Day Off”
22nd	”	6PM x—to— x 2AM	1 ”	on the position, and there being 4
23rd	”	6PM x— —x 2AM	1 ”	Wednesdays in the month, leaving 26
24th	”	6PM x— —x 2AM	1 ”	working days.
25th	”	6PM x— —x 2AM	1 ”	For employes in
26th	”	6PM x— —x 2AM	1 ”	extra service or working irregular
27th	”	6PM x— —x 2AM	1 ”	watches, see Examples “D”
WED. 28th		DAY OFF		
29th	”	6 PM x——to x 2AM	1 ”	Total of nine days
30th	”	6PM x— —x 2AM	1 ”	at $4.9769 per day.

Effective with
May 1, 1926.
C.W.D.

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EXAMPLES "D"

SHOWING METHOD OF COMPENSATING EXTRA EMPLOYES, OR THOSE WORKING IRREGULAR WATCHES

Employes serving on "12 & 24" hour watches to be paid as follows:

(a) For thirty-one (31) day month, daily rate to be arrived at on basis of 1/31st, of the monthly wage.

(b) For thirty (30) day month, daily rate to be arrived at on basis of 1/30th, of the monthly wage.

(c) During February, for twenty-eight (28) day month, daily rate to be arrived at on basis of 1/28th, of the monthly wage; twenty-nine (29) day month, 1/29th, of the monthly wage.

Employes serving on such "8 & 16" hour watches to be paid as follows (where no established "Day off" for use in obtaining divisor)—

(d) For thirty-one (31) day months and thirty (30) day months, daily rate to be arrived at on basis of 1/26th of the monthly wage.

(e) During February, for twenty-eight (28) day month, daily rate to be arrived at on basis of 1/24th, of the monthly wage; twenty-nine (29) day month, 1/25th of the monthly wage.

Effective with May 1st, 1926. C.W.D. [344]

(Testimony of F. E. Gorman.)

The witness was shown a table relating to rates of pay of firemen and testified in substance:

Column A shows the rates paid a 12 and 24 hour fireman before the September adjustment. This table relates to broken assignments. The firemen shown in Column A were paid month by month beginning March 1st.

Q. When you came to make the adjustment and refiguring the time of these firemen, what daily rate did you take?

A. As shown on the exhibit, $5.6109.

Q. And that was arrived at, as shown by the exhibit, by multiplying 12 times the monthly salary of $146.35, and dividing that by 313 working days.

A. Well, I did not make the formula, but that method, as shown there, will give you the figure, $5.6109.

Q. The hourly rate was 0.7014.

A. It would be, following the formula set forth there.

Q. And that was arrived at, as shown on this exhibit?

A. Yes, sir.

Q. So that where a man worked 12 hours on a watch in one month, and did not work any other 12-hour watch during the month, if it was a 21-watch month, he had been paid during that six months a day and a half at the rate of $4.646 per day?

A. Yes, sir.

(Testimony of F. E. Gorman.)

Q. And when you came to make the adjustment, you gave him a day and a half at the daily eight-hour rate, and paid him $5.6109?

A. Yes, sir. We used that.

Q. And the same applied, with the exception—

A. (Int'g) Of course, we figured what it would amount to at a day and a half times $5.6109 and subtracted what we had originally paid him at $4.646, and we allowed him the difference. [345]

12-24, FIREMAN—RATES OF PAY, MCH. 1-AUG. 31, 1928
Showing rates originally paid and Rates used in adjustment of Sept. 1928.

COL. A Broken Assignments COL. B.

COL. A		COL. B.	
Rates paid before Sept. Adjustment		Rates used in Sept. adjustment	
The monthly rate was	$146.35	The monthly rate was	$146.35
Daily rate for 8 hour day—21 watches		Daily rate	$5.6109
21 12-hr. watches= 31-1/2 8-hr. days		146.35 x 12 months= $1756.20 divided by 313 working days	
$145.35 -:- 31-1/2=	$4.646		
Daily rate for 8 hr. day—20 watches: 20 12-hr. watches = 30 8-hr. days.		This formula prescribed by Rule 2 (a) of the agreement, and is the same daily rate as paid to 8-16 hr. firemen.	
$146.35 -:- 30 =	$4.8783		
Hourly rate—arrived at under Rule 9 of agreement—12 months x $146.35= $1756.20 divided by 2920 hrs. (or 8 x 365) =	$.6014	Hourly rate	$.7014
		$146.35 x 12 months = $1756.20 divided by 2504 hrs. the no. of hours in 313 8-hr. working days is formula prescribed by Rule 9 (a) of agreement and is same hourly rate paid to 8-16 hour firemen.	

[346]

(Testimony of F. E. Gorman.)

The witness continued: We used the same system for everybody, deckhands as well as firemen. The deckhands got about $7 a month less than the firemen; the figures are in the record. The figures shown in Column A were paid month by month during the period from March 1st to September 1st, and the basis of the adjustment is shown in Column B, and that applied in every case to the broken watch.

Q. You say this hourly basis was arrived at in the same manner as prescribed in Rule 9 of the 1925 agreement for computing overtime, which reads: "Subdivision (a) on 8 and 16 hour watches divide 12 times the monthly salary by 2504."

A. That is correct.

Q. Have you checked Plaintiff's Exhibit Number 10, which shows the overtime they claim in this case, and the amount demanded?

A. Yes, sir, I have checked the exhibit.

Q. Does their demand for overtime of .7014 for firemen, is that arrived at, or is that the same figure as is arrived at by subdivision (a) of Rule 9?

A. Yes, sir.

Q. Is their hourly demand for overtime for the deckhands arrived at then in the same manner as under Rule 9?

A. Yes, sir.

Q. Have you checked plaintiff's Exhibits 8-A and 8-B, the large exhibits, which you originally prepared?

(Testimony of F. E. Gorman.)

A. Yes, sir, I have checked these exhibits.

Q. Now, have you made a table showing the result of that check?

A. Yes, sir, I have.

Q. Is this table correct?

A. Well, it is, yes, sir; I have checked it and it checked true, according to my check.

The table was introduced in evidence as Exhibit G and is as follows: [347]

ANALYSIS AND COMPARISON OF FULL MONTHLY AND BROKEN MONTHLY ASSIGNMENTS

Southern Pacific Co. (Plaintiff's Ex. 8a)

	(1) No. of full monthly assignments worked at 12 hours each.	(2) No. of broken monthly assignments worked at 12 hours each	(3) Total number of 12 hour watches in broken monthly assignments —Col. 2
Firemen	294	153	2248
Deckhands	812	288	3941
Northwestern Pacific R. R. (Plaintiff's Ex. 8b)			
Firemen and Deckhands	116	60	914

Note: For definition of broken assignment See Note to Rule 1 of 1925 Agreement—Plaintiff's Ex. 2. That note has not changed by the Arbitration Board.

MR. BOOTH: Q. There was some testimony here regarding the fireman named Leimar, who did not work the full month during any of these six months. For the sake of the record, and, as a basis for an

(Testimony of F. E. Gorman.)
illustration which I desire to use in argument, I will ask you to state, month by month, how much was paid Leimar in back pay in September for overtime during those six months?

A. In the month of March, 1928, he received \$13.48; the month of April he received \$1.10; in the month of May \$14.93; the month of June \$20.88; the month of July, \$20.88; and the month of August \$27.50

Q. Now, will you read off, please, the same monthly payments for A. L. Costa, who worked every month?

A. A. L. Costa received in March, 1928, \$30.39; April \$29.98; May, \$30.39; June, \$21.98; July, \$21.98; August, \$30.39. [348]

THE COURT: That was overtime?

A. That was overtime, yes, sir, your Honor.

MR. SHARP: Q. That was back-pay?

A. That was back pay that was allowed him on the adjustment.

MR. SHARP: That is the fundamental difference in the two figures. Under our contention, all the company did was to figure back pay, and what we want is overtime.

MR. BOOTH: We don't see any difference in paying a man a day and a half at the 8-hour rate and paying him a day at the 8-hour rate and 4 hours overtime, because a day and a half at the daily eight-hour rate was just the same as the 12 hours.

MR. SHARP: That is the difference between the parties in a nut shell, your Honor. It is our contention, as we will argue, that is just what you can't do.

(Testimony of F. E. Gorman.)

Cross-Examination.

MR. SHARP: Q. I just want to bring one or two matters out clearly. As I understand the exhibit which is on the board, Column A shows the basis upon which checks were originally made out?

A. Originally, yes, sir.

Q. In other words, where a man worked the full number of assigned watches, he got paid at $146.35 for a month and where he worked less, you figured it on this daily or hourly basis?

A. Yes, sir.

Q. Now, when you came to making the adjustment, all that you did was to refigure the hours or days worked on this new rate shown in Column B?

A. Yes, sir.

Q. Then, after figuring what the men should have gotten under your formula at this new rate you gave the men checks to compensate between the difference at the old rate and at the new rate?

A. Yes, sir. [349]

Q. All that you were concerned with was merely giving the men an additional so much per hour or day for the total number of hours worked by the men during each period.

A. I was paying them exactly according to the formula handed down to me.

Q. I realize that, I am not questioning it. I am trying to show the arithmetic, the actual process you went through.

A. The way I pointed out was the way it was done.

(Testimony of F. E. Gorman.)

Q. In figuring the amount that should have been paid under your new adjusted rate, you lumped the days and hours by month, as I understand the application of that formula, as explained by you. In other words, you took the total number of hours the men worked in a month, added them together for the month, divided by 8 to get a theoretical number of eight hour days, and then applied this new increased rate.

A. In other words, if a man had worked 31-1/2 8-hour days during the month, I multiplied 31-1/2 times the 8-hour rate of pay, and subtracted what I had already paid him under the 12-hour rate of pay and gave him the difference.

Q. In doing that, you did not segregate the last four hours of each watch from the first eight hours of each watch, but treated the entire 12 hours as an additional 12 hours to be added to your monthly total?

A. The basis of pay allowed was a day and a half for each of those 12-hour watches.

The same principle was involved throughout.

Q. I am not talking about principle; I am talking about what you actually did. I am trying to get at the arithmetic, what you actually physically did. In order to apply the new rate to find out what the men should have been paid, you took the total number of hours actually worked that particular month. [350]

A. Total number of eight hour days.

Q. Yes, Well, as a matter of fact, I am just trying to get the physics before the court. Say, in the month

(Testimony of F. E. Gorman.)

of March a particular fireman worked twenty 12-hour watches, you multiplied by 20 that 12 to get 240 hours, and divide that by 8 to get 30 days.

A. The hours don't enter into it at all, Mr. Sharp. It is all days. If it is a 12-hour watch it is a day and a half; if it is an 11-hour and 40-minute watch, it is still a day and a half.

Q. Well, all right. Let me put some figures on the blackboard. Take any particular man—it doesn't make any difference who—that in a particular month worked, let us say, 21 watches. You said that was the equivalent of 31-1/2 eight hour days, didn't you?

A. Yes.

Q. And you applied the daily rate of $5.6109, didn't you?

A. When I was figuring his adjustment, yes.

Q. And that would have been exactly the same thing as taking the total number of hours and multiplying it by .7014; it comes to exactly the same amount?

A. Twelve hour watches; it would work out exactly the same.

Q. It would work out exactly the same?

A. Yes.

Q. What I am trying to get before the court is what you actually did. You aggregated the number of watches by the month, you aggregated the number of days by the month, you aggregated, in effect, the number of hours per month, and you treated them all as a total unit?

(Testimony of F. E. Gorman.)

A. If you take a man with a full assignment it would work out that way, yes.

Q. All right. Now, you did not make any segregation at all as to the last four hours of any particular watch, or the first eight hours of any particular watch, but you treated them all exactly the same?

A. As a day and a half [351]

Q. And added that day and a half to get your total of 31-1/2 eight hour days for that month?

A. For a twenty-one watch assignment, yes, sir.

Q. But where a man worked 21 watches, you put down 21 twelve hour watches; you simply treated that as 31-1/2 days for that period?

A. It would be, yes, sir.

Q. And at no part did your formula require you, nor did you in actual practice, treat and differently the last four hours of a 12-hour watch from the first 8-hours of a 12-hour watch?

A. The formula will bear it out. It is made into eight hour days.

Q. Yes. In other words, it amounts to your taking the last four hours of the first watch and the second four hours of the second watch and calling the two twelve hour watches the equivalent of three eight hour watches?

A. Three eight hour days, yes.

MR. HANCOCK

Recalled as a witness

MR. BOOTH: Q. Mr. Hancock, you heard Mr. Gorman's testimony this morning regarding the memorandum of May 1, 1926, and the subsequent memorandum of May 25th or 26th, 1926, which slightly changed that memorandum?

A. Yes, sir, it was slightly changed. Mr. Deal called my attention to the fact that a 12 and 24-hour man starting his first watch early in the month would actually have 31-1/2 days service in a 31-day month.

Q. In other words, if you followed the formula of May 1, 1926, he would get a half a day the worst of it on a broken assignment?

A. Yes, sir.

Q. I ask you whether this memoranda applied to the Northwestern Pacific, as well as to the Southern Pacific?

A. I would not be able to answer that. Copies of it were furnished to the Northwestern Pacific, but whether they placed them in effect, [352] I could not testify.

Q. Were these memoranda reached after a conference between you and Mr. Deal?

A. Well, Mr. Deal was consulted with and had to do with the preparation of the memoranda. He initialed them when they were completed.

Q. And after they were reduced to mimeographed form, did you send him copies of them.

A. Yes, sir.

(Testimony of Mr. Hancock)

Q. Was there ever, to your knowledge, any complaint from Mr. Deal or anyone else regarding the interpretations as set forth in the memoranda?

A. Only as to the suggestion with respect to the 31-1/2 eight hour days.

Q. At the present time there are no monthly rates of pay for assigned watches?

A. No. Later on, I believe it was early in 1929, Mr. Deal and myself agreed to adopt daily rates of pay, and abandoned the use of the monthly rate entirely." [353]

Both parties rested.

Mr. Booth moved that

1. The plaintiffs be required to elect whether they will pursue their motion for appointment of a Commissioner in the original proceeding to impeach the award—No. 1955-S in this court—or whether they will stand on their pleading and proceeding denominated an ancillary bill in equity or whether they will stand on their original bills in equity numbers 3635S and 3636S.

2. The proceedings and suits referred to under paragraph "one" of this motion and each of them be dismissed for want of jrisdiction of this court to determine them or any of them.

3. That if said motion to elect be denied or if this court proceeds to determine the issues arising upon the pleadings in said ancillary proceeding or

in said original proceedings (Nos. 3635S and 3636S) it find in favor of the defendants and find: (a) That the controversy between the parties is a dispute respecting the meaning or application of an award under the Railway Labor Act of 1926 which required and requires a resubmission to the arbitration board which made said award and an application to the Federal Mediation Board for a reconvention of said board of arbitration. (b) That plaintiffs' assignors were before their assignments to plaintiffs predecessor in title, fully paid by these defendants each and all sums due them under said award or due, or payable to, them or any of them by reason of their having worked twelve hour watches during the period from March 1, 1928, to August 31, 1928, inclusive. (c) That before the delivery and cashing of the adjustment checks in September and October, 1928, a dispute existed between the defendants' employes, whose assigned claims are held by plaintiff Union, and each of the defendants as to the proper method of computing payment to the men who worked twelve-hour [354] watches during a period when 12-24 hour assigned watches had no longer been provided for by the arbitration award; that the allegations of the separate defenses in the answers respecting the form, delivery, cashing and all matters pertaining to pay checks delivered in October and November, 1928, are true and correct; that the defense of release and of accord and satisfaction are true in fact and valid in law and that said releases and satisfactions have

never been rescinded or set aside and are a bar to plaintiffs' recovery: (d) that plaintiffs take nothing by any of their suits or proceedings herein.

The Court reserved its ruling on the motions.

Later on the court stated that the motion for findings was granted.

After discussion the motion for election was submitted.

Whereupon the case was argued by Mr. Sharp and Mr. Booth.

In the course of Mr. Sharp's argument, plaintiffs' Exhibit No. 15 was admitted into evidence.

The matter was submitted.

The foregoing constitutes all the evidence received by the Court.

Jan. 10, 1936.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for Plaintiffs. [355]

IT IS HEREBY STIPULATED that the foregoing statement is true and correct and contains all the testimony and proceedings upon the trial of the foregoing cases and the same may be certified by the court and used on appeal, and may be included in the record on appeal in lieu of the original statement filed.

January 10, 1936.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for Plaintiffs.

HENLEY C. BOOTH

A. A. JONES

Solicitors for Defendants. [356]

CERTIFICATE OF COURT

Pursuant to the foregoing stipulation, the foregoing statement is hereby found and certified to be true and correct and to contain all the testimony and proceedings in the foregoing case and upon the trial thereof, and may be filed as part of the record on appeal in lieu of the original statement filed. January 14. 1936

A. F. ST. SURE
District Judge.

[Endorsed] Filed Jan. 14, 1936. [357]

[Title of Court and Causes—Nos. 1955-S, 3635-S, 3636-S.]

ORDER ALLOWING APPEAL.

The within petitions for appeal in the above matters are hereby allowed and a joint bond for appeal in all the above matters is hereby fixed at the sum of Two Hundred Fifty ($250.00) and 00/100 Dollars.

A. F. ST. SURE
District Judge.

Dated: October 22, 1935. [358]

[Title of Court and Cause.—No. 1955]

PETITION FOR APPEAL.

To the Honorable A. F. St. Sure, District Judge:

Now come Ferryboatmen's Union of California, Inc., a corporation, Ferryboatmen's Union of California, an unincorporated association, and C. W. Deal, plaintiffs herein, by Messrs Derby, Sharp, Quinby & Tweedt, their solicitors, and feeling aggrieved by the final orders and decrees of this Court heretofore rendered and entered herein denying plaintiffs certain relief requested by them, hereby pray that an appeal may be allowed to them upon all of said decrees and orders, to the Circuit Court of Appeals for the Ninth Circuit, because of the errors specified in the assignment of errors filed in connection with this petition.

Petitioners further pray that a citation may issue as [359] provided by law, that a transcript of the record, proceedings and papers on which said decree was based be made and duly authenticated and lodged in said Circuit Court of Appeals at the City of San Francisco, State of California, and that the amount of security for costs may be fixed by the order allowing the appeal.

Dated: October 21, 1935.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for Plaintiffs. [360]

[Title of Court and Cause.—No. 3635-S.]

PETITION FOR APPEAL.

To the Honorable A. F. St. Sure, District Judge:

Now come Ferryboatmen's Union of California, Inc., a corporation, Ferryboatmen's Union of California, an unincorporated association, and C. W. Deal, plaintiffs herein, by Messrs. Derby, Sharp, Quinby & Tweedt, their solicitors, and feeling aggrieved by the final orders and decrees of this Court heretofore rendered and entered herein denying plaintiffs certain relief requested by them, hereby pray that an appeal may be allowed to them upon all of said decrees and orders, to the Circuit Court of Appeals for the Ninth Circuit, because of the errors specified in the assignment of errors filed in connection with this petition.

Petitioners further pray that a citation may issue as provided by law, that a transcript of the record, proceedings and papers on which said decree was based be made and duly authenticated and lodged in said Circuit Court of Appeals at the City of San Francisco, State of California, and that the amount of security for costs may be fixed by the order allowing the appeal.

Dated: October 21, 1935.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for plaintiffs [361]

[Title of Court and Cause.—No. 3636-S.]

PETITION FOR APPEAL.

To the Honorable A. F. St. Sure, District Judge:

Now come Ferryboatmen's Union of California, Inc., a corporation, Ferryboatmen's Union of California, an unincorporated association, and C. W. Deal, plaintiffs herein, by Messrs. Derby, Sharp, Quinby & Tweedt, their solicitors, and feeling aggrieved by the final orders and decrees of this Court heretofore rendered and entered herein denying plaintiffs certain relief requested by them, hereby pray that an appal may be allowed to them upon all of said decrees and orders, to the Circuit Court of Appeals for the Ninth Circuit, because of the errors specified in the assignment of errors filed in connection with this petition.

Petitioners further pray that a citation may issue as provided by law, that a transcript of the record, proceedings and papers on which said decree was based be made and duly authenticated and lodged in said Circuit Court of Appeals at the City of San Francisco, State of California, and that the amount of security for costs may be fixed by the court allowing the appeal.

Dated: October 21, 1935.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for Plaintiffs.

[Endorsed]: Filed Oct. 22, 1935. [362]

[Title of Court and Causes—Nos. 1955-S, 3635-S, 3636-S.]

ASSIGNMENTS OF ERROR

Now come plaintiffs Ferryboatmen's Union of California, Inc., a corporation, Ferryboatmen's Union of California, an unincorporated association, and C. W. Deal, by Messrs. Derby, Sharp, Quinby & Tweedt, their solicitors, and in connection with their petitions for appeal, say that in the record, proceedings, findings and in the [363] final decree herein, manifest error has intervened to the prejudice of the plaintiffs, to-wit:

I.

The Court erred in making and entering its final order and decree herein, and in ordering and in decreeing in favor of defendants and against the plaintiffs.

II.

The Court erred in not modifying the findings of and conclusions of law herein in accordance with plaintiffs' objections and proposals filed herein.

III.

The Court erred in signing the findings of fact and conclusions of law as proposed by defendants herein.

IV.

The Court erred in refusing to rule on plaintiffs' motion in Case No. 1955-S for an appropriate order to carry into effect the judgment and decree

therefore rendered therein and in not making any such order nunc pro tunc as of September 25, 1933, in accord with the stipulation of the parties.

V.

The court erred in allowing costs to defendants.

VI.

The court erred in finding that the employes referred to in the pleadings were "fully paid" and in particular in finding that the defendants "did * * * fully pay" to each employe all sums of money due him.

VII.

The Court erred in failing to set forth or allege the facts upon which are based the conclusion of full payment and in refusing to set forth the facts relied upon in making such conclusion and finding. [364]

VIII.

The Court erred in stating in the findings that the employes' demand "necessitated an interpretation of the award." The Court also erred in not specifying the parts of the award involved and the alleged controversy of the parties in reference thereto.

IX.

The Court erred in finding that the Union could not satisfy the judgment obtained by it herein in its favor.

X.

The Court erred in purporting to find that the official for the carriers "further said in explanation" a special form of check was used because he understood the men contemplated making some technical claim.

XI.

The Court erred in failing to find that no such statement was ever communicated to any employe or union representative and in failing to find that the official representing the carriers repeatedly stated he never discussed the matter with the Union and therefore could not have communicated any such statement to the Union. The Court also erred in failing to find that no such statement was ever communicated to the union or to any employe.

XII.

The Court erred in failing to find that said official for the carriers stated as follows:

> "Said official of the carriers told the said business manager of the union 'We will pay the men what we think they are entitled to, what the award says they should be paid, and if there is anything wrong we will take it up afterward, as we have done in the past.' "

The Court also erred in not finding that there was no difference of opinion between the parties. [365]

XIII.

The Court erred in failing to find that neither the amounts due the men nor the method of com-

puting the same was ever discussed by any official representing the carriers, with the men or their representatives.

XIV.

The Court erred in finding there was a dispute "concerning the amount due" and in failing to find the matter was never discussed between the parties.

XV.

The Court erred in finding that the checks were accepted "in full satisfaction," and in failing to find that all wage checks under the union practice and custom of the carriers were to be cashed subject to correction thereafter.

XVI.

The Court erred in failing to find that it was the uniform and regular practice of the carriers to correct and adjust all wage checks without exception and without objection regardless of the fact they were endorsed as received in full.

XVII.

The Court erred in failing to find that in attempting to secure the abolition of 12-hour watches the men claimed they were motivated by the desire to abolish a system which was deemed unsafe and dangerous.

XVIII.

The Court erred in failing to find that the men during the period of controversy worked all the watches to which they were assigned by the carriers,

and that none of the men were assigned to 8-hour watches but were assigned to 12-hour watches by the carriers, and paid a monthly wage for all assigned watches. [366]

XIX.

The Court erred in failing to find as to the number of hours in excess of eight worked by each man.

XX.

The Court erred in failing to find for the plaintiffs and against the defendants and also erred in failing to order decree entered for plaintiffs and against defendants and in failing to enter a decree for plaintiffs.

And said plaintiffs and each of them pray that the decree of said District Court of the United States for the Northern District of California, Southern Division denying plaintiffs relief and allowing defendants a decree and costs may be reversed and annulled and that a decree and orders granting plaintiffs and each of them relief may be entered.

Dated: October 21, 1935.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for Plaintiffs.

[Endorsed]: Filed Oct. 22, 1935. [367]

[A bond on appeal was duly approved and filed.] [368]

[Title of Court and Causes—Nos. 1955-S, 3635-S, 3636-S.]

STIPULATION RE CONSOLIDATING FOR APPEAL, ETC.

Is is hereby stipulated by and between the parties hereto that all the matters above captioned may be consolidated and heard on appeal as one matter. [371]

There shall be but one decree entered herein covering all the above matters and on appeal there shall be only one petition for appeal, one order allowing appeal, one bond on appeal and one record on appeal and in all other respects the matters shall be treated on appeal as one case.

Dated: July 22, 1935.

H. C. BOOTH & A. A. JONES
Attorneys for defendants.

DERBY, SHARP, QUINBY & TWEEDT
Attorneys for plaintiff

So ordered.

July 23, 1935.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed July 23, 1935. [372]

[Praecipes were duly filed by the respective parties hereto.] [373]

[Title of Court.]

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 376 pages, numbered from 1 to 376, inclusive, contain a full, true and correct transcript of the records and proceedings in the Equity causes entitled as follows: IN THE MATTER OF AN AWARD filed herein October 31, 1927, etc. No. 1955-S. FERRYBOATMEN'S UNION OF CALIFORNIA, etc., et al. vs. SOUTHERN PACIFIC COMPANY, No. 3635-S. FERRYBOATMEN'S UNION OF CALIFORNIA, etc., et al., vs. THE NORTHWESTERN PACIFIC RAILROAD COMPANY, No. 3636-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $51.95 and that said amount has been paid to me by the Attorneys for the Appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 28th day of January, A. D. 1936.

[Seal] WALTER B. MALING, Clerk

By J. P. Welsh, Deputy Clerk.

[377]

[Title of Court and Cause.—No. 1955-S.]

CITATION ON APPEAL.

United States of America, ss:

The President of the United States of America To Northwestern Pacific Railroad Company, Southern Pacific Company and The Western Pacific Railroad Company, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern Division of California, Southern Division, wherein Ferryboatmen's Union of California, a nonprofit corporation, Ferryboatmen's Union of California, an unincorporated association, and C. W. Deal are appellants, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, this 23rd day of October, A. D. 1935.

A. F. ST. SURE

United States District Judge.

Receipt of a copy of the within citation is hereby acknowledged this 25th day of October, 1935.

HENLEY C. BOOTH & A. A. JONES
Solicitors for Appellees. N. W. P. R. R. Co. & S. P. Co.

[Endorsed]: Filed Oct. 28, 1935 [378]

[Title of Court and Cause.—No. 3635-S.]

CITATION ON APPEAL.

United States of America, ss:

The President of the United States of America To Southern Pacific Company, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Ferryboatmen's Union of California, a non profit corporation, and C. W. Deal are appellants, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, this 23rd day of October, A. D. 1935.

A. F. ST. SURE
United States District Judge.

Receipt of a copy of the within citation is hereby acknowledged this 25th day of October, 1935.

HENLEY C. BOOTH & A. A. JONES
Solicitors for Appellee S. P. Co.

[Endorsed]: Filed Oct. 28, 1935. [379]

[Title of Court and Cause—No. 3636-S.]

CITATION ON APPEAL.

United States of America, ss:

The President of the United States of America To Northwestern Pacific Railroad Company, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Ferryboatmen's Union of California, a non profit corporation, and C. W. Deal are appellants, and you are appellee, to

show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, this 23rd day of October, A. D. 1935.

A. F. ST. SURE

United States District Judge.

Receipt of a copy of the within citation is hereby acknowledged this 25th day of October, 1935.

HENLEY C. BOOTH & A. A. JONES

Solicitors for Appellee. N. W. P. R. R. Co.

[Endorsed]: Filed Oct. 28, 1935. [380]

[Endorsed]: No. 8117. United States Circuit Court of Appeals for the Ninth Circuit. Ferryboatmen's Union of California, an unincorporated association, Ferryboatmen's Union of California, a non profit corporation, and C. W. Deal, Appellants, vs. Northwestern Pacific Railroad Company, Southern Pacific Company, and The Western Pacific Railroad Company, Appellees. Ferryboatmen's Union of California, a non profit corporation, and C. W. Deal, Appellants, vs. Southern Pacific Company, Appellee. Ferryboatmen's Union of California, a non profit corporation and C. W. Deal, Appellants, vs. Northwestern Pacific Railroad Company, Appellee. Transcript of Record Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 29, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8117

[Title of Causes—Nos. 1955-S, 3635-S, 3636-S.]

STIPULATION THAT CERTAIN PAPERS NEED NOT BE PRINTED.

It is hereby stipulated by and between the parties hereto as follows:

1. There need not be set out in full in the printed record on appeal the following pages of the typewriten transcript:

A. Ancillary bill in action 1955-S, pages 1-10 inclusive.

B. Answer of Southern Pacific Company to ancillary bill in 1955-S, pages 20-42, inclusive.

C. Answer of Northwestern Pacific Railroad Co. to ancillary bill in 1955-S, pages 43-66, inclusive.

D. Bill of Northwestern Pacific Railroad Co. in action 3636-S, pages 130-141, inclusive.

E. Answer of Northwestern Pacific Railroad Co. in action 3636-S, pages 142-180 inclusive.

F. The bond, pages 368-370, inclusive.

G. Two praecipes, pages 370-376 inclusive.

2. In lieu of the ancillary bill and answers in 1955-S on pages 1-66 inclusive of the typewritten record, the following may be inserted:

In action 1955-S the plaintiffs filed an "Ancillary Bill to enforce Decree already rendered herein." The allegations therein contained are substantially the same as the bill against the Southern Pacific Company which is printed later herein, being action #3635-S. For reasons of economy and in order to avoid unnecessary duplication this bill is not printed here.

The Southern Pacific Company and the Northwestern Pacific Railroad Company filed answers to this bill. The allegations of these answers are substantially the same as the allegations of the Southern Pacific Company in their answer in #3635-S, which is printed later herein. They are not printed here as a matter of economy and in order to avoid unnecessary duplication.

3. In lieu of the bill and answer in action 3636-S, on pages 130-180 of the typewritten record, the following may be inserted:

In action 3636-S plaintiffs filed a "Bill in Equity to Enforce Decree" against the Northwestern Pacific Railroad Company. The allegations of this bill are the same as the allegations of the bill in 3635-S, except for the names of the men involved and the amounts claimed. The data as to the men involved and the amounts paid and claimed appear in the various exhibits introduced by the parties, as set out in the statement of evidence and are printed later

herein. As a matter of economy and to avoid unnecessary duplication this bill is not printed herein.

The answer in the same case is omitted for the same reasons and because the allegations, except for names and amounts, are identical with the allegations of the Southern Pacific Company in 3635-S, which is printed herein.

4. In lieu of the bond, on pages 368-370 of the typewritten transcript, the following may be inserted.

A bond on appeal was duly approved and filed.

5. In lieu of the praecipe on pages 370-376 of the typewritten transcript, the following may be inserted:

Praecipes were duly filed by the respective parties hereto.

6. Only three copies of the printed transcript need contain the large photostated exhibit 8-A. These will be furnished by counsel for plaintiffs. Should additional copies of this photostat exhibit be required for use in proceedings before the Supreme Court of the United States, Messrs. Derby, Sharp, Quinby & Tweedt personally guarantee to provide and pay for such copies as may be needed or deemed necessary for use by counsel for carriers. Said counsel for plaintiffs will also furnish Mr.

Booth with an extra copy of the exhibit for his own personal use in the present proceeding.

March 27, 1936.

DERBY, SHARP, QUINBY & TWEEDT,
Solicitors for Plaintiffs.

HENLEY C. BOOTH
A. A. JONES
Solicitors for Southern Pacific Company and Northwestern Pacific Railroad Company.

[Endorsed]: Filed March 30, 1936, Paul P. O'Brien, Clerk.

No. 8117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

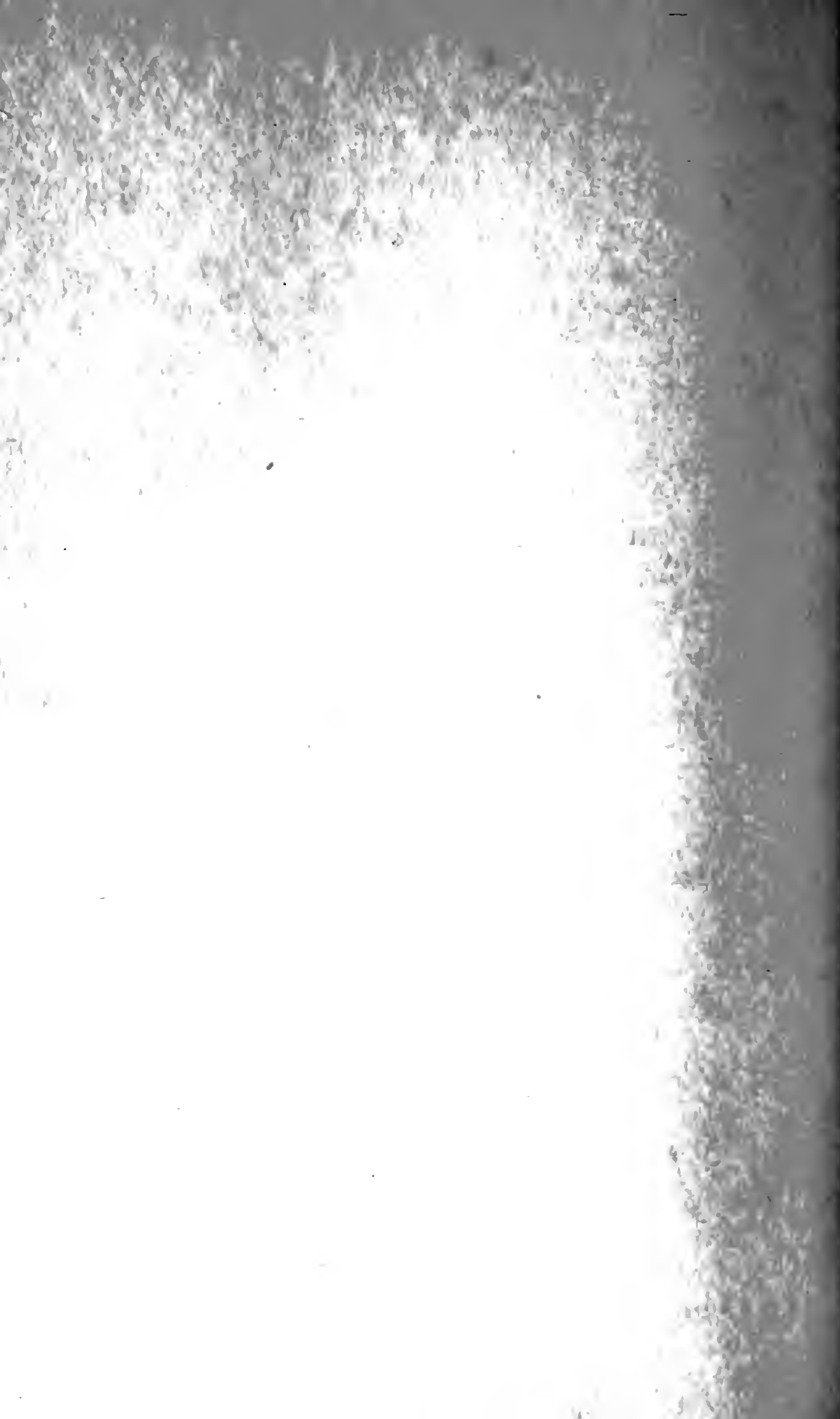
vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

BRIEF FOR APPELLEES.

HENLEY C. BOOTH,
A. A. JONES,
65 Market Street, San Francisco,
Attorneys for Appellees.

FILED
MAY 9 - 1936
PAUL P. O'BRIEN,
CLERK



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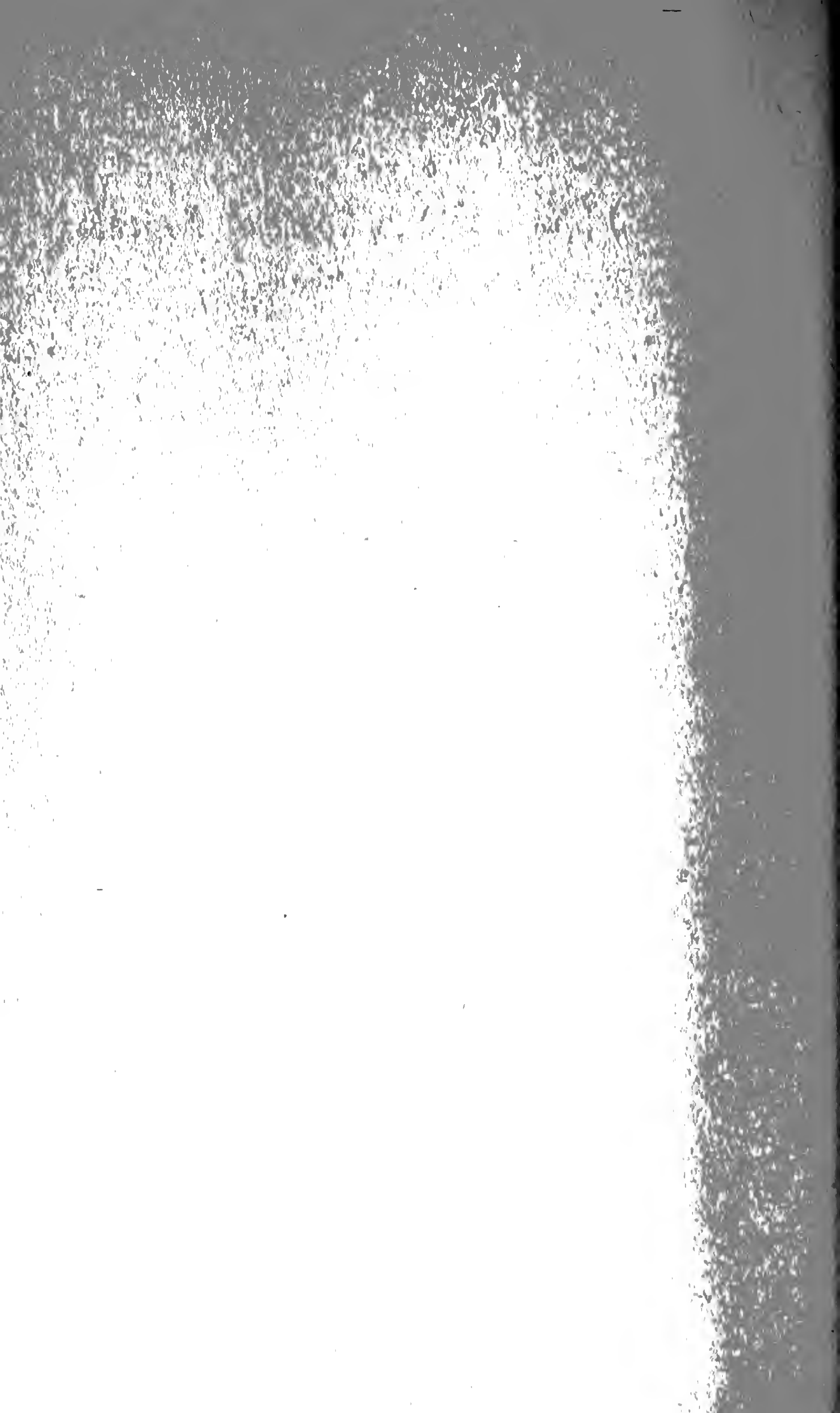

No. 8117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

BRIEF FOR APPELLEES.

Appellants appeal from final orders and decrees against them by the United States District Court for the Northern District of California, Hon. A. F. St. Sure, Judge, in certain proceedings and suits brought

by them on the equity side of the Court wherein they seek recovery against each of the appellees for certain amounts which if payable at all are payable under the terms of contracts between the appellees and their ferryboatmen made in 1925 but amended by an award made by a Board of Arbitration created under the Railway Labor Act of 1926 and affirmed by a judgment of the District Court entered under Sec. 9 of that Act.

A RESTATEMENT OF THE FACTS.

Rule 24 requires that appellant's brief contain a statement of the case, which appellee need not furnish "unless that presented by the appellant is controverted".

Appellant's statement of the case (Brief pp. 1-7) is argumentative, incomplete and, in important respects, inaccurate. We shall, therefore, restate the case using as the basis and ground-work for the restatement the special findings of the trial judge before whom the testimony was taken *viva voce*. In such of his findings as we reproduce we insert references to the printed record in this Court, supply italics for emphasis and supplement the findings by further references to the printed record.

It is noteworthy that the trial judge, Hon. A. F. St. Sure, was the same judge before whom was heard the proceeding to impeach the original award, considered by this Court in *A. T. & S. F. Ry. et al. v. Ferryboatmen's Union,* 28 Fed. (2d) 26. Moreover

counsel err in stating (Brief p. 5) that "there was no conflict of testimony". There was sharp conflict in the testimony in a number of respects we shall designate; we take it that appellees are entitled to the benefit of whatever presumption may be given the conclusions reached by the trier-of-fact on substantial conflict of testimony.*

The Facts as Shown by the Special Findings.

(*Finding I, R. p. 118*): "The above entitled cases are the outgrowth of an award filed with the Clerk of this Court on October 31, 1927, pursuant to an arbitration held under the Act of Congress known as the Railway Labor Act. (44 Stat. p. 577; 45 USCA Sec. 151, et seq.)"

"The present controversy is between defendant railroads and the assignee of their employees. An accounting and additional back pay is sought for what plaintiff claims to have been overtime work performed during a six-months' period from March 1, 1928, to September 1, 1928, and not paid for. The railroads claim that these employes were fully paid for that period.

"In 1925, the Atchison, Topeka & Santa Fe Railway, Northwestern Pacific Railroad Company, Southern Pacific Company and the Western Pacific Railroad (hereinafter called the carriers), had separate agree-

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* (NOTE): Preceding the special findings the trial judge filed a written opinion (R. pp. 91-111) to which we respectfully refer.

ments covering 'hours of service, working conditions and rates of pay' with their employes classified as marine firemen, deckhands, cabin watchmen, night watchmen, and matrons (hereinafter called the union), 'employed on passenger, car and automobile ferries, tugs towing car floats and fire boats' operated by the carriers on San Francisco Bay." *(The Southern Pacific agreement is at pp. 68 et seq. of the Record. It was also admitted in evidence as Plffs. Ex. No. 2 (R. pp. 146-7); The Northwestern Pacific agreement was substantially the same. (R. p. 291).)*

(Finding II, R. pp. 119-122): "On January 7, 1927, the carriers entered into an agreement with the union under said Railway Labor Act to submit to arbitration certain demands of employes for increases in pay and changes in working conditions. A copy of the agreement is attached to defendant's answer in each case, and marked Exhibit 'B'. *(R. pp. 81 et seq. It was also admitted in evidence as Plffs. Ex. 3; R. p. 147.)* The agreement provided: 'The specific questions to be submitted to the Board for decision are whether or not there shall be any increase in the wages or changes in Working Rules Nos. 6 and 8 of the employes of these railroads. . . .

"Rule 6 then read: '*Assigned crews,* except as hereinafter provided, will work either on basis of: (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off, or (b) Eight (8) hours or less on watch *each day for six (6) consecutive days.*' *(R. p. 82.)* Then follows a list of 'exceptions', some of which will be referred to later.

"Rule 8 then read: 'The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of *the present recognized straight time assignment* shall be paid for in addition to the monthly salary at the pro-rata rate.' (*R. p. 84.*)

"The specific questions submitted under Rule 6 were: '(a) Shall the rule remain as written, or (b) shall the portion of the rule down to the word "exceptions" be changed so as to read: "Assigned crews will work on the basis of eight (8) hours or less on watch *each day for six (6) consecutive days.*"' (*R. p. 84.*)

"The specific questions submitted under 'Rule 8—Overtime' were '(a) Shall the present rule providing for pro-rata rates of pay for overtime remain in effect, or (b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?' (*R. p. 85.*)

"In its award, a copy of which is attached to Plaintiffs' Bill in each case as Exhibit 'A' (NOTE: *This is slightly in error. The award is included in the judgment, Ex. A to Plffs. Complt., R. p. 23, the judgment having been admitted in evidence as Plffs. Ex. 7 (R. p. 148)*), the board increased wages $10 per month, fixing the rates of pay as follows *(R. p. 25):*

"Passenger and car ferries, and tugs towing car floats:

Firemen	$146.35 per month
Deckhands	139.40 " "
Cabin Watchmen	139.40 " "
Night Watchmen	120.00 " "
Matrons	85.00 " "
Fire Boats:	
Firemen	97.57 " "
Deckhands	92.94 " "

"The award changed Rule 6 to read as follows: 'Rule 6. Assigned crews will work on the basis of eight (8) hours or less on watch *each day for six (6) consecutive days'. (R. p. 25.)*

"The award affirmed Rule 8, above quoted. *(R. p. 27.)*

"Petition for impeachment of the award filed by the carriers was dismissed by this Court and the award confirmed. Upon appeal, the decision of this Court was affirmed by the Circuit Court of Appeals on August 20, 1928. *Atchison, T. & S. F. Ry. Co., et al. v. Ferryboatmen's Union of Cal.,* 28 F. (2d) 26.

"On May 19, 1928, pending the appeal from decision of this Court to the Circuit Court of Appeals, the carriers and the union entered into a stipulation (NOTE: *Included in the judgment at pp. 28 and 29, Record),* the pertinent part of which reads as follows:

> '1. That the ten dollars ($10.00) per month increase made by said award is to be put into effect and paid beginning May 1, 1928, and is to remain in effect until April 1, 1929, and there-

after subject to the 30-day provision in the existing contracts between the Ferryboatmen's Union of California and the respective carriers, copies of which contracts are exhibits in this case and are on file in the records of this Court.

'2. That the $10.00 per month increase is to be retroactively paid to January 1, 1927; payment of such retroactive increase is to be made to the employees in service during all or any part of the period from and including January 1, 1927, to and including April 30, 1928, as early as practicable and not later than June 15, 1928.

'3. That if the above entitled Circuit Court of Appeals affirms the decree confirming the award the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927, to March 1, 1928.

'4. On the coming down of the remittitur or mandate from the Circuit Court of Appeals to the District Court the judgment of the District Court shall incorporate and *confirm the terms of this stipulation* irrespective of whether said Circuit Court of Appeals affirms or reverses the judgment and order of the District Court heretofore rendered herein.'

"After affirmance by the Circuit Court of Appeals, this Court, on September 29, 1928, entered a judgment incorporating the award and said stipulation." (NOTE: *That judgment is Plffs. Ex. 7, R. p. 148, and is reproduced in full as Exhibit A to one of the complaints at pp. 23-34 of the Record.)*

(Finding III, R. p. 122): "A copy of the judgment, which embodies said stipulation as well as the award of the Arbitration Board, is set forth in full as Ex-

hibit 'A' in Plaintiff's Bills in each suit *(R. p. 23)*, and is incorporated by reference in the answers of defendants, Southern Pacific Company and Northwestern Pacific Railroad Company, in each case.

"Copies of the agreements of 1925 between the employees represented by their union, on the one hand, and defendants, Southern Pacific Company and Northwestern Pacific Railroad Company, on the other, fixing wages and working conditions are set forth as Exhibit 'A' in the answers of defendants in each case." *(R. p. 68.)*

(Finding IV, R. p. 123): "During the period from and including March 1, 1928, to September 1, 1928, the carriers, as appears by their answers, continued in employment in the same capacities certain of their employees 'who had formerly and prior to said arbitration agreement been employed as so-called '12-hour men', and so continued them upon the same basis or hours of service and on the same regular assigned watches as they and all of the so-called 'former 12-hour men' had been employed prior to said arbitration agreement'."

"During the pendency of the appeal the carriers, in accordance with the award and stipulation, paid the $10 per month wage increase to all employes. On September 26, 1928, the mandate of the Circuit Court of Appeals affirming the decree of this Court was filed herein."

(*Finding V, R. pp. 125-6*): "On September 30, 1928, the carriers made payment to their employes for overtime, the amounts so paid being ascertained by

the application of the following formula to each individual work record:

'Memorandum as to application of (313 divisor)* wage rates and methods of computing back pay for Marine Firemen, Deckhands, Cabin Watchmen and Night Watchmen, serving on 12-hour watch assignments, and who were accorded 48-hour week under Arbitration Award.

Monthly, Daily and Hourly Rates of Pay are as follows:

Classification	Monthly Rate	Daily (8-Hour) Rate	Hourly Overtime Rate
Passenger and Car Ferries and Tugs Towing Car Floats			
Fireman	$146.35	$5.6109	.7014¢
Deckhand	139.40	5.3444	.6681¢
Cabin Watchman	139.40	5.3444	.6681¢
Night Watchman	120.00	4.6006	.5751¢
Matron	85.00	3.2588	.4073¢

'Employes who served on twelve (12) hour watch assignments, (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is, (except on Fire Boats where there is no change) they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours.

* (NOTE): The "313" divisor refers to the fact that where a man worked continuously on the 8-16 hour watches throughout the year he was on watch each day for six consecutive days, as required by Rule 6 as it read before the award (Finding I, supra) as well as after the award (Finding IX) and therefore worked but 313 days per year (365 minus 52). To ascertain the daily pay of an "8-16 hour" man Rule 2, which was unchanged by the award, except as to monthly rates of pay, provided (Finding IX) that 12 times the monthly salary should be ascertained and then divided by 313.

'It is concluded that the best way to arrive at the balance due any such individual, is to take the total number of eight (8) hour days, and the number of hours overtime served during a month and multiply the same by the above enumerated daily and hourly rates, then allow as additional compensation, the difference between the total so obtained and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be reduced to a certain additional amount per day or hour, and so shown on the pay-roll for more complete record purposes.

'Care should be exercised to see that credit is taken for back pay allowances on special payrolls for the months of March and April, 1928, the $10.00 per month wage increase allowed being included on regular payroll commencing with May 1st.

'Under above, individual back pay allowances for months of March, April, May, June, July and August, should be computed separately for each month, but all included on one payroll, that one pay-check may be issued to cover all that is due any employe. For month of March make additional allowance only in connection with watches that were commenced at midnight of Feb. 29th-March 1st, 1928, or thereafter. For August include on back payrolls only watches commencing prior to midnight of Aug. 31st-Sept. 1st, 1928.

'Commencing with Sept. 1st, 1928, such employes involved should be compensated on the new (48-hour week) basis on regular payrolls. Hours of service assignments as provided for in Rule 6 and its exceptions as contained in the Arbitra-

tion Award, should be made effective as rapidly as practicable.'

"It is hereby found that the rates per hour and per day contained in the foregoing formula were correctly computed and applied."

(*Finding VI, R. p. 126*): "When the original proceedings were had, the Ferryboatmen's Union of California, to which had been theretofore assigned the claims of the individual employes, was an unincorporated association. On October 2, 1931, the union was incorporated as a nonprofit corporation under the laws of California, and on the same day, the unincorporated union assigned to the corporation all of its rights and interest in said claims of the employes and in the judgment of this court, and the corporation now appears as the plaintiff herein seeking in equity an enforcement of the decree in the original proceeding; the suit against the Atchison, Topeka, Santa Fe Railway Company has been settled; the Western Pacific Railroad has, by stipulation of counsel, agreed to abide by the final decision herein. The only defendants now before the Court are the Southern Pacific Company and the Northwestern Pacific Railroad Company."

(*Finding VII, R. pp. 126-7*): "The union filed three several pleadings all involving the same subject matter and concerning which there could be under the circumstances, but a single recovery. In the original proceeding, Case 1955-S, there was filed a motion 'that the Court make such other orders as will be necessary or proper to carry into effect the judgment

and decree heretofore entered herein', including a reference to a commissioner to ascertain the amounts due. The union also filed, in Case 1955-S, an ancillary bill to enforce the judgment and also filed separate bills in equity (Cases Nos. 3635-S and 3636-S) against each carrier for an accounting. In each suit or proceeding the same relief was sought and therefore the proceedings and suits above referred to were consolidated, tried and submitted for decision as one case. Motions that plaintiff elect its remedy were denied."

(*Finding VIII, R. p. 127*): "Defendants, in their several answers, affirmatively pleaded that a dispute, as defined under the provisions of the Railway Labor Act (U. S. Code Supp. II, Title 45, Sec. 151, et seq.) existed between them and their employes as to the meaning and application of the award and that this Court had no jurisdiction to entertain either or any of plaintiff's causes of action; the Court found and now finds it has jurisdiction of the parties and subject matter."

(*Finding IX, R. pp. 127-9*): "The evidence shows that the award changed Rule 2 of each 1925 working agreement by increasing the rate of pay as above specified, but the following language of the rule remained unchanged: 'Note: Employes working broken assignments will be paid in following manner: (a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313. (b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365. * * * Above applies to

employes whose monthly assignment is broken as well as to relief employes and those in extra service.'

"The award affirmed Rule 8 defining overtime, above quoted, and left unchanged Rule 9, relating to fixing overtime rate, as follows:

> '*Rule 9.* To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment. Note: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner: (a) On 8 and 16 watches, divide 12 times the monthly salary by 2504. (b) on 12 and 24 watches, divide 12 times the monthly salary by 2920.'

"Under said award, eight consecutive hours constituted a day's work with certain exceptions not applicable to the plaintiffs' assignors. Under the 1925 agreement and until changed by the award assigned crews worked either on the basis of (a) twelve hours on watch, then twenty-four hours off watch, without pay for time off, or (b) eight hours or less on watch *for six consecutive days.* The award eliminated the twelve-hour watch, establishing hours of service as in Rule 6 above quoted, with the exceptions above referred to.

"Following the award, the carriers continued to assign certain crews and employes from March 1, 1928, to August 31, 1928, inclusive, under the former twelve-hour watch, paying the men at the increased monthly rate, but nothing for overtime until the adjustment was made in September, 1928; under the 1925 agreement a twelve-hour man was not entitled

to overtime until he worked twelve hours on watch; that no time over twelve hours on watch is involved here, all time over twelve hours on a single watch having been fully paid."

(*Finding X, R. pp. 129-130*): "The evidence shows the purpose of the carrier's formula, above quoted, was to equalize the pay of the 12 and 24-hour men who worked during the period March 1st to August 31, 1928, with the pay of the 8 and 16-hour men who worked during the same period; that the straight-time rate and the overtime rate of the carriers were and are the same; and that under the adjustment made by the formula, the hourly and daily rate of compensation of the 12 and 24-hour men was exactly the same as that of the 8 and 16-hour men. That the rate of pay here contended for by the union would give the 12 and 24-hour men a preference in pay of about eighteen per cent. per hour worked over the pay of the 8 and 16-hour men when both classes were working on regular assigned watches; that before the award, the 12-hour men worked more hours per month than the 8-hour men on regular assigned watches, and their hourly earnings were less than the 8-hour men, there being thereby created an inequality of from 10 to 13 per cent. against the 12-hour men because *while* (*sic*) the monthly pay of both classes on regular assigned watches was the same."

(*Finding XI, R. p. 130*): "There are two distinct classes of claims involved herein. There are, first, the 12 and 24-hour men who did work all of the assigned watches in a month; that is, the 20 or 21 twelve-hour watches in the month, and, second, those men who

worked less than the 20 or 21 twelve-hour watches and who are called broken assignment men. Over 25 per cent of the claims are for broken assignments which were not payable on the basis of a full month's pay but adjustable under Rule 2, hereinbefore referred to. One of the principal objects of the arbitration was to equalize the pay between these two classes; that by the September adjustment plus what they had already received under said stipulation, the 12-hour men got exactly what the 8-hour men were paid when they worked 8 hours straight time and 4 hours overtime."

Finding XII (R. p. 130) contains a tabulation showing that firemen (and the same illustration applies to all of appellant's assignors) who worked all 12-24 assigned watches in a calendar month were fully paid when the adjustment check was given to them.

Finding XIII (R. p. 132) contains an analytical tabulation showing that a "12-24 hour" man who worked but one 12 hour assigned watch during a month was fully paid for the four hours overtime on that 12 hour watch.

Finding XIV (R. p. 133) shows by a similar table "12-24 hour" men who worked "broken assignments" during a month—that is, not all of the 12 hour assigned watches that fell within that month (see Finding XI, supra)—were fully paid for the four hours overtime on each 12 hour watch.

Finding XV (R. p. 134) similarly shows by detailed analysis that the "12-24 hour" men "were paid full 8-16 hour rates for days and hours worked as well as overtime".

The illustrations contained in Findings XII, XIII, XIV, and XV, supra, cover all the classes of claims in suit—that is, the case where one of plaintiff's assignors worked but one 12 hour assigned watch in a month, the case where he worked more than one 12 hour assigned watch in a month but not all of the 12 hour assigned watches in that month, and, finally, the case where he worked all of the 12 hour assigned watches in that month.

All of the assigned claims held by appellant fall in one or another of those classifications. Therefore repetition of the elaborate tables that appear in the record and that show the service of each "12-24 man" during the period in question would needlessly complicate this statement of facts.

(Finding XVI, R. p. 135): "It is hereby found that each defendant railroad did with respect to its employes who, as aforesaid, assigned their claim to said unincorporated union, fully pay to such employe by said September, 1928, adjustment all sums of money then due, owing or unpaid him under said award, stipulation or judgment and that each of the defendants has fully complied with said award, stipulation and judgment."

(Finding XVII, R. p. 135): "The evidence shows that when said September, 1928, adjustment was made the carriers issued and delivered counterprinted pay checks to each individual employe having a claim for overtime. These checks were in the usual form of payroll voucher issued in payment for services by the respective railroad companies, with additional words

printed on the face of the checks as follows: On each adjustment of the Southern Pacific Company, immediately following the statement of the sum for which payment was made, were printed these words and figures: '*For additional compensation account arbitration award between So. Pac. Co. and Ferry Boatmen's Union, Oct. 21, 1927. For March to August, 1928, inclusive.*' On each adjustment check of the Northwestern Pacific Railroad Company were printed these words and figures: '*Balance due for period Mar. 1, '28 to Aug. 31, '28 account wage adjustment.*' And on the reverse side of each of said checks issued to the employes of the two railroads above mentioned, and above the signature of the payee, appeared the following words: '*Endorse here. This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within.*' " (*Later in the brief we will point to the evidence that sustains this and the next succeeding findings.*)

(Finding XVIII, R. p. 136): "The evidence shows that the judgment directed the carriers to put the wages and rules of the award into effect and cause all of said employes to be paid all back pay retroactively or otherwise due to them in accordance with the award. The judgment was not a liquidated demand, but necessitated an interpretation of the award. The judgment was not one for which the union could enter satisfaction of record, as the individual employes were the actual judgment creditors of the company.

"Before the checks were delivered to the employes, the business manager of the union and the representa-

tive of its members under the Railway Labor Act, stated to an official of the carriers 'that for each 12-hour watch worked the men were entitled to 4 hours overtime'. The official for the carriers said 'the company would pay the men what was due them under the award'. The official further said in explanation that the checks were issued in the special form above described as he understood the men 'contemplated making some technical claims'. The carriers construed the award and paid the men the amounts they considered due to the men, using the form of check above described. Payment was accepted by the men, the check clearly indicating what it was for, and the payee in each case signing acknowledgment of receipt in full."

(*Finding XIX, R. p. 137*): ". . . found that there was a dispute concerning the amount due and the payments represented by the aforementioned checks and that they were accepted in full satisfaction thereof; in each case the defendant carriers, in their answers, set forth the affirmative plea that by reason of the foregoing facts the employes released them from all claims and demands for or on account of having worked on 12-24 hour watches or more during the period March 1st to August 31st, 1928, both days inclusive. *The facts and circumstances are sufficient to sustain the defense of the carriers of an accord and satisfaction and of a release.*"

Changes Made by the Award.

The Agreement of 1925 contained 38 numbered sections. (*R. pp. 68-80.*) The Agreement to Arbi-

trate (*R. pp. 81-88*) submitted three "specific questions" (*R. p. 82*) "whether or not there shall be any increase in the wages, or changes in working rules Nos. 6 and 8, of the employes of these railroads".

It followed the requirement of subd. (f) of Sec. 8 of the Railway Labor Act of 1926 (44 Stat. 584) that the agreement to arbitrate "shall state specifically the questions to be submitted to the said board for decision" and that the "board shall confine itself strictly to" those questions.

Thus there was to be no rewriting of the contract; the Board was confined strictly to considering and passing on a specified and limited number of amendments.

For convenient reference we now present in parallel columns certain sections of the Contract of 1925 relevant to the case and the Board's amendments to certain of those sections.

Agreement of 1925

Rates of Pay.

Rule 2 (R. p. 69):

Passenger and Car Ferries and Tugs Towing Car Floats:

Firemen
$136.35 per month
Deckhands
$129.40 per month
Cabin Watchmen
$129.40 per month
Night Watchmen
$110.00 per month
Matrons
$75.00 per month

Fire Boats:

Firemen
$90.90 per month
Deckhands
$86.30 per month

NOTE: Employes working broken assignments will be paid in the following manner:

(a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.

(b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365.

(c) On 12 and 24 watches, with one watch off per month, allow one and one-half days for each watch

Changes Made by Award.

Rates of Pay.

Rule 2 (R. p. 25):

Passenger and Car Ferries, and Tugs Towing Car Floats:

Firemen
$146.35 per month
Deckhands
$139.40 per month
Cabin Watchmen
$139.40 per month
Night Watchmen
$120.00 per month
Matrons
$85.00 per month

Fire Boats:

Firemen
$97.57 per month
Deckhands
$92.94 per month

(NOTE BY APPELLEES: It will be observed that the note to Rule 2 was not changed by the award. The Arbitration Board had no power to do so granted by the Agreement to Arbitrate. See R. p. 82.

It is important to note that in the original Rule 2 as well as in the amended Rule 2 the same monthly salary is paid irrespective of the number of hours on and off watch.)

worked, on basis of 12 times the monthly salary, divided by 347.

Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service.

Basic Day.

Rule 5 (R. p. 70):

Eight (8) consecutive hours shall constitute a day's work.

Basic Day.

Rule 5 was not submitted to or changed by the Arbitration Board.

Hours of Service.

Rule 6 (R. pp. 70-1):

Assigned crews, except as hereinafter provided, will work either on the basis of:

(a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off.

or

(b) Eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions.

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two-crewed boats beyond assigned hours of regular crews.

Hours of Service.

Rule 6 (R. pp. 25-7):

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.

Exceptions.

(1) On boats with two crews, watches may be separated by an interval of time.

(2) Extra crews may be used on any day it is found necessary to operate one or two crewed boats beyond assigned hours of regular crews.

(3) On basis of Section (a) of this Rule, length of watches may be varied as necessary to arrange relief, but must average eight (8) hours per calendar day in any cycle of three (3) weeks.

(4) Where two crews are used, watches may be as long as eight hours and forty minutes, provided the combined watches do not exceed sixteen hours and no crews work over forty-eight hours in six consecutive days.

(5) On boats operating out of Vallejo Junction, one crew will be used each day. Employes will work twelve hour watches for two days, with the third day off, without pay for time off, and repeat.

(6) On tugs towing car floats crews working on basis of Section (b) of this Rule may be worked not to exceed nine hours and twenty minutes per watch.

Crews on basis of Section (a) of this Rule will be given one watch off per month. Such watch will be designated by the Railroad.

(7) On fire boats, crews will work twenty-hours on

(3) Where three crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed twenty-four (24) hours *and no crew works over forty-eight (48) hours in six (6) consecutive days.*

(4) Where two crews are used, watches may be as long as eight (8) hours and forty (40) minutes, provided the combined watches do not exceed sixteen (16) hours and *no crew works over forty-eight (48) hours in six (6) consecutive days.*

(5) On boats operating out of Vallejo Junction crews *may be assigned twelve (12) hours per day and not to exceed forty-eight (48) hours per week.*

(6) On one and two crewed tugs towing car floats crews may be worked not to exceed (9) hours and twenty (20) minutes per watch.

(7) On three crewed tugs, towing car floats and

and then twenty-four hours off without pay for time off.

(8) Limit anywhere provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume traffic which cannot be handled on schedule trips.

(9) Watches on three-crewed boats shall not begin or terminate between one (1) A. M. and six (6) A. M.

(10) Employes required to operate boat to and from yard shall be paid regular run rates.

car ferries, except on Carquinez Straits, crews *may be assigned twelve (12) hours on watch with twenty-four (24) hours off watch, provided such assigned watches average forty-eight (48) hours per week* within the time required to bring it about.

(8) On Fire Boats, crews will work twenty-four (24) hours on and then twenty-four (24) off without pay for time off.

(9) Limit anywhere provided on length of watches does not apply in emergency or when necessary to make extra trips to handle heavy volume of traffic which cannot be handled on schedule trips.

(10) Watches on three crewed boats shall not begin or terminate between one (1) A. M. and six (6) A. M.

(11) Employes required to operate boats to and from yard shall be paid regular run rates.

(12) Night Watchmen may be assigned on *twelve (12) hour watches four (4) days per week.*

(NOTE BY APPELLEES: None of plaintiffs' assignors worked under these excep-

tions. But the Arbitration Board clearly recognized the principle that on regular assigned watches the carrier was entitled to 48 hours per week for the monthly salary and also recognized the "six consecutive day" principle by using the language we have italicized in exceptions 3, 4, 5, 7 and 12 in this column.)

Overtime.

Rule 8 (R. p. 72):

The monthly salary now paid the employes covered by this Agreement shall cover the *present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate.*

Overtime.

Rule 8 (R. pp. 27-28):

The monthly salary now paid the employes covered by this agreement shall cover the *present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate.*

(NOTE BY APPELLEES: Rule 8 was submitted to the Arbitration Board on the employes' claim of "time and one-half" instead of "straight time" for overtime hours. (Agreement to Arbitrate, R. p. 85.)

The Board, as shown, made no change in the text of the rule but republished it in the award, obviously because it had changed Rule 6.)

Fixing Overtime Rate.

Rule 9 (R. p. 72):

To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment.

NOTE: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner:

(a) On 8 and 16 watches, divide 12 times the monthly salary by 2504.

(b) On 12 and 24 watches, divide 12 times the monthly salary by 2920.

(c) On 12 and 24 watches, with one watch off per month, divide 12 times the monthly salary, by 2776.

Overtime for employes operating under Exception (5) to Rule 6, Fireboat employes and night watchmen, will be computed under Section (b) of this note.

(NOTE BY APPELLEES: The divisor, 2504 in (a) of the Note to Rule 9 is produced by multiplying 313 eight hour watches per year by 8 hours for each watch.)

Fixing Overtime Rate.

Rule 9 was not submitted to the Board of Arbitration and the Board made no reference to it.

ARGUMENT.

I.

THE ISSUES ARE WITHIN NARROW LIMITS.

Plaintiffs' demands for additional pay.

1. Plaintiffs' demands relate only to men who worked on regular assigned "12-24 hour watches"—that is, 12 hours on duty and then 24 hours off duty—during all or part of the six months of March to August, inclusive, 1928. None of those men worked under the "Exceptions" to Rule 6. Plaintiffs' assignors were of two classes:

(a) Those who worked all of the 20 or 21 "12-24 hour" watches during an entire calendar month.

(b) Those who, during a calendar month worked one or more but not all of the 20 or 21 "12-24 hour" watches during that month. Those are called "broken assignments".

2. Each of plaintiffs' assignors who worked any time over 12 hours on any one watch was paid "overtime" currently for the additional time worked. That character of "overtime" is not here involved.

3. Each of plaintiffs' assignors who worked all of the 20 or 21 "12-24 hour" watches during a calendar month was currently paid the monthly wage rate for that month as increased by the award.

4. Each of plaintiffs' assignors who worked one or more 12-24 hour watches on a "broken assignment" was paid currently at the 12-24 hour rate (as increased by the award's increase of $10 per month) for the time worked. (Table, R. p. 307.)

5. The fact that the men who worked under "3" above worked more hours per month than 8-16 hour men, and the men who worked under "4" above worked more hours per watch than 8-16 hour men, required an adjustment at the end of the six months' period to comply with the stipulation that if the award was affirmed the new watch rules should be retroactive to March 1, 1928.

6. The adjustment was made by additional pay checks given to plaintiffs' assignors—who worked under paragraphs "3" and "4" above—the amount of which, in each case, when added to the amounts previously paid currently during those six months on the basis shown in paragraphs "3" and "4" above gave plaintiffs' assignors "exactly what the 8 hour men were paid when they worked 8 hours straight time and 4 hours overtime". (Finding XI, R. p. 130.)

Results of plaintiffs' demands for additional pay.

But the plaintiff demands additional pay for each of its assignors. To sustain that demand

(a) would result in those of them who worked all of the 20 or 21 regular assigned 12-24 watches in a month receiving a month's pay at the increased monthly rate for the first 8 hours of each of the 20 or 21 twelve hour watches worked plus overtime for the last 4 hours of each 12 hour watch, whereas the 8-16 hour men of the same class worked 26 or 27 eight hour watches during the same month for the same monthly pay and

without overtime pay, the *monthly* pay being the same for both classes of watches; and

(b) would result in each of plaintiffs' "12-24 hour" assignors receiving about 18% more per hour for his work than the 8-16 hour men received, whereas before the arbitration a "12-24 hour" man received some 13% less per hour than the 8-16 hour man, "one of the principal objects of the arbitration" being "to equalize the pay between these two classes". (Finding XI, R. p. 130.)

The trial Court—as we believe and shall urge as strongly as we may—correctly declined to grant demands so at variance with an important object of the arbitration and so opposed to all considerations of equity and principles of interpretation of contracts.

Accord and satisfaction and release.

As separate defenses each appellee pleaded accord and satisfaction as well as release. The Southern Pacific adjustment checks bore on their faces a special sentence which read: "Arbitration Award between So. Pac. Co. and Ferryboatmen's Union, Oct. 31, 1927. For March to August, 1928, inclusive. For Additional Compensation Account." (R. p. 228.) The Northwestern Pacific adjustment checks bore a special sentence reading: "Balance due for period Mar. 1, '28 to Aug. 31, '28. Account wage adjustment." (R. p. 230.)

Each check was signed by the payee under the following printed endorsement. (R. pp. 229-30.)

> "Endorse Here. This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated herein."

Those defenses of accord and satisfaction, and release, presented mixed questions of fact and law. The trial Court found the facts in each defendant's favor. (Findings XVII, XVIII and XIX, R. pp. 135-137.) We will discuss the law in Chapter VII of this brief.

The rule applicable to consideration of the findings of the trial Court.

Appellants argue the evidence as though this appeal were a hearing *de novo*. They sued in equity and this Court has held in four cases (*Clements v. Coppin* (C. C. A. 9), 61 F. (2d) 552, 557; *McCullogh v. Penn. Mutual Life Ins. Co. of Phila.* (C. C. A. 9), 62 F. (2d) 831; *U. S. etc. v. McGowan* (C. C. A. 9), 62 F. (2d) 955; *Collins et al. v. Finley* (C. C. A. 9), 65 F. (2d) 625, 626) that findings of the trial Court in a suit in equity based on conflicting testimony taken in open Court will not be disturbed on appeal.

If, as we believe, the instant suits are not in equity, although instituted and heard in that form, but are essentially cases at law by an assignee of unpaid wage claims (see Chapter VI of this Brief), then the rule is, as stated by Circuit Judge Parker in *Fidelity & Deposit Co. v. People's Bank et al.* (1934), (C. C. A. 4th), 72 Fed. (2d) 932-934:

"Although the case is essentially one at law, it was heard in equity by the court below, without objection from appellant, and was brought here by appeal in equity. We review it, therefore, as though it were an equity cause. Twist v. Prairie Oil & Gas Co., 274 U. S. 684, 692, 47 S. Ct. 755, 71 L. Ed. 1297; Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp. (C. C. A. 4th), 64 F. (2d) 347, 348. This does not mean, however, that we will hear the case de novo, or will assume the function of auditors with respect to the voluminous books and records which have been certified to the court, but that we will review it as we do any other equity case under the rule that the findings of fact of the trial judge will not be reversed unless clearly wrong. Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.r supra; U. S. Industrial Chemical Co. v. Theroz Co. (C. C. A. 4th), 25 F. (2d) 387; New York Life Ins. Co. v. Simons (C. C. A. 1st), 60 F. (2d) 30."

Citing the case just referred to that rule is made part of the text by Mr. O'Brien on page 55 of his 1935 Cumulative Supplement to the second edition of his *Manual of Federal Appellate Procedure.*

Counsel for appellants have followed the somewhat common practice of assuming that where the evidence is directly or inferentially conflicting the appellants' evidence should control.

A DISCUSSION OF THE CASE ON THE MERITS.

The arrangement of appellants' brief is such that for us to attempt to answer its points seriatim would only result in further cloudiness and confusion.

We shall, therefore, endeavor to argue the salient points in the main case as we see them and as the trial Court found them in appellees' favor.

II.

The appellants' theory results in giving its assignors eighteen per cent more per hour than the men who were performing the same class of services at the same time on 8-16 hour watches during the six months in question, and who worked six consecutive days per week. Such was not the object of the arbitration or the intention of the award or of the stipulation made pending appeal to this Court.

In the opinion filed by the trial judge he says (R. p. 99):

"In addition to the foregoing statement the following facts are undisputed: * * *

"(R. 101) That the purpose of the carriers' formula, above quoted, was to equalize the pay of the 12 and 24-hour men with the pay of the 8 and 16-hour men; that the straight-time rate and the overtime rate of the carriers are the same, and that under the formula the rate of compensation of the 12 and 24-hour men was exactly the same as that of the 8 and 16-hour men; that the rate of pay contended for by the union would give the 12 and 24-hour men eighteen per cent additional over the 8 and 16-hour men; that

> before the award, the 12-hour men worked more hours per month than the 8-hour men and their hourly earnings were less than the 8-hour men, an inequality of from 10 to 13 per cent against the 12-hour men, which caused dissatisfaction and led to the arbitration."

The language just quoted from the opinion is repeated *verbatim* in Finding X. (R. p. 129.)

Let us take as typical the case of a fireman who worked on an 8-16 hour assigned watch before the award and compare it with a fireman who, before the award worked on a 12-24 hour assigned watch.

Each of them received $136.35 per month. (R. p. 82.) But the 8-16 hour fireman worked 313 eight hour watches per year or 2504 hours per year and Rule 9 (which was unchanged by the award) provided (R. p. 72) that his hourly rate should be ascertained by dividing 12 times his monthly salary by 2504 (12x$136.35=$1,636.20; divided by 2504 hours equals $.65343 per hour).

The 12-24 hour fireman worked only 245 watches per year but, because of the 12 hour watch, a greater number of hours per year than the 8-16 hour man and therefore while he received the same amount per *month* he received a less amount per *hour;* 12x$136.35 =$1,636.20; divided by 2920 hours per year under Rule 9, supra, equals $.56034 per hour, or a differential of about 14.25% *per hour* against the 12-24 hour man, although he received the same pay *per month* and *per year* as the 8-16 hour man.

An amicable agreement was arrived at on May 1, 1926, between the carrier and the Union to iron out

some inequalities in computations and rates resulting from the strict application of Rule 2, as well as to provide some working interpretations of the contract rules. It is explained in witness Gorman's testimony (R. pp. 291 et seq.) and the formulae introduced as Defts.' Ex. D, R. page 295. Under it practically the same difference in percentage of *hourly* pay remained in favor of the 8-16 hour men. It is otherwise unimportant to the consideration of these appeals.

Because of the petition for impeachment and the Court proceedings that followed, the former 12-24 hour men continued to work on those assigned watches after the award was filed with the clerk of the District Court and until a judgment was entered by that Court on order of this Court, finally disposing of the controversy and affirming the award. They so worked during the six months—March-August, 1928. During that six months the award was suspended.

The additional checks they received and cashed in October, 1928, plus the amounts they had already received currently placed them on an exact parity with the men who had been working on 8-16 hour assigned watches during that six months period so far as earnings *per hour* were concerned. This is not—and cannot truthfully be—disputed. If no adjustment had been made in September, 1928, the 12-24 hour men would have worked during the 6 months period at the same rate per month as but at a lesser rate per hour than the 8-16 hour men as above shown. And if this Court had directed the District Court to annul the award that differential would have remained and no

adjustment of the 12-24 hour men's pay would have been required.

But, not satisfied with the final adjustment putting them on the same hourly basis of pay as 8-16 hour men in the same class of service during that six months they now seek a basis of recovery which would give them about 18% more per hour than the 8-16 hour men just mentioned.

That is entirely inconsistent with the purpose of the arbitration and the spirit of the award.

We illustrated this unjust and unfounded claim of an 18% differential by a table introduced in evidence by us on the examination of witness Gorman. (R. p. 257.) That table follows:

(Defendants' Exhibit F, R. p. 258.)

Analysis of Hours and Pay of Two Firemen Beginning Watches, March 1, 1928, 6:30 a. m.; "A" on 12-24 Hour Basis and "B", the Other, on 8-16 Hour Basis.

12-24 man "A" No. of 12-hr. watches		Total Hours	8-16 man "B" No. of 8-hr. watches	Total Hours
March	21	252	27	216
April	20	240	26	208
May	20	240	26	208
June	20	240	26	208
July	21	252	27	216
August	21*	252	26	208
6 months in Suit	123	1476	158	1264

*Last 12-hour watch in Aug. ran into Sept. but paid for as Aug. watch.

DURING THE 6 MONTHS

Each man ("A" and "B") received by semi-monthly pay checks 6 mos. pay at $146.35 (the award rate) $878.10

8-16 hr. man's monthly pay= .7014 per hr. on watch

12-24 hr. man's monthly pay= .6014 per hr. on watch

BY ADDITIONAL PAY-CHECK DATED

Sept. 30, 1928, the 12-24 hr. man ("A") received 157.11

(Arrived at by taking 1476 hrs. as 184½ constructive 8-hr. days x $5.6109 DAILY 8-HR. RATE =$1035.21 less $878.10 already paid) —— $1035.21

THE 12-24 HOUR "A" MEN HAVE BEEN PAID PRIOR TO SUIT

$1035.21 ÷ 1476 hours = $.7014 per hour or the same rate per hour as the 8-16 "B" men

FORMER "A" EMPLOYEES—ABOVE ILLUSTRATION*—NOW SUE FOR

123 watches at 8 hrs. to equal 6 mos. at $146.35 per mo., or .... $ 878.10

and 123 4 hr. overtime periods, or 492 hrs. at $.7014 per hr. 345.09

$1223.19

Less amount already pd. 1035.21

$ 187.98

*NOTE: As shown in tabulation at the beginning of this exhibit the 8-16 hour men worked 158 8-hour watches during the same 6 months.

THE AMOUNT THE FORMER "A" MEN NOW SUE FOR PLUS THAT ALREADY PAID EQUALS

$1223.19 ÷ 1476 hrs. = $.8287 per hour, as against the 8-16 hr. man's $.7014 or an 18 + % differential in favor of the 12-24 hr. men, thus creating an inequality in favor of the former 12-24 hour "A" men and against the former 8-16 hour "B" men.

Witness Gorman stated with respect to the result of the final adjustment (R. p. 259):

> "The effect of the additional pay check in the case of the 12 and 24 hour man was to raise the amount he received per hour to exactly the same amount that the 8 and 16 hour man had received by his monthly pay check. This was 70.14 cents per hour.
>
> If each day were treated as a unit, as the men sue for in this case, this would create an earning for them of 82.87 cents per hour as against the earning of the 8 and 16 hour men of 70.14 cents, or a differential of 18 plus per cent in favor of the men who worked during that 6 months on the 12 hour shifts."

Witness C. W. Deal, Secretary and Manager of the Union, admitted on direct examination in rebuttal (R. p. 275) "for many years the men working 12 hour watches had been paid a less rate than the 8 hour men". Obviously he meant "a less rate per hour" because the monthly rate was the same for both classes of assigned watches before and after the award.

Further on page 208, on cross-examination when he appeared in plaintiff's case in chief, Deal said:

"Mr. Deal. The 12-hour men did not always get the same amount as the 16-hour men. The wages fixed in the contract were the same per month on regularly assigned watches for the 12-hour men and 8-hour men, but they did not always get the same amount of money.

Mr. Booth. Q. But the 12-hour men worked more hours per month than the 8-hour men did and consequently their hourly earnings were less than those of the 8-hour men. Isn't that correct?

A. Under the old agreement that is correct, and that also was the cause, or one of the principal points before the Arbitration Board, and that was the reason for the arbitration.

Q. Yes, that there was an inequality there?

A. Yes."

The union went before the Board complaining not only that the 12-24 hour watches were unduly arduous and also making the fanciful claim that those hours were hazardous to safe operation when it is a matter of common knowledge that a serious accident has not occurred in appellees' ferry service for a generation, but they also stressed before the Board, as shown above, that while the 12-24 hour men were getting the same amount per month—for a less number of watches—than the 8-16 hour men, they were because of the greater number of hours of service on each watch during the month getting less money per hour.

Unsatisfied with the rectification of that condition by all assigned watches being put on the 8-16 hour basis, the same union now seeks to recover, during the six-months period when the carriers had moral and legal right to test the award, an 18% differential *per*

hour in favor of the 12-24 hour men against the 8-16 hour men.

Yet, counsel insist, these are suits in equity. Nothing more inequitable could be imagined in a wage controversy.

As stated, there are two classes of claims involved —those based on "full monthly assignments" where 20 or 21 watches per month were worked, and those based on broken monthly assignments where less than the 20 or 21 watches were worked. These are shown in detail in Plffs. Exs. 8-a and 8-b and summarized in the following exhibit:

(Defts. Ex. G, witness Gorman, R. p. 309.)

Analysis and comparison of full monthly and broken monthly assignments.

Southern Pacific Co. (Plaintiff's Ex. 8a)

	(1) No. of full monthly assignments worked at 12 hours each.	(2) No. of broken monthly assignments worked at 12 hours each	(3) Total number of 12 hour watches in broken monthly assignments —Col. 2
Firemen	294	153	2248
Deckhands	812	288	3941
Northwestern Pacific R. R. (Plaintiff's Ex. 8b)			
Firemen and Deckhands	116	60	914

Note: For definition of broken assignment See Note to Rule 1 of 1925 Agreement—Plaintiff's Ex. 2. That note was not changed by the Arbitration Board."

As already shown the man who worked the 20 or 21 watches during a full month was paid the monthly pay as increased by the award. His overtime was paid in the final adjustment.

The basis of pay for the "broken assignment man" —both during the six months and on final adjustment are shown by another exhibit as follows:

(Witness Gorman, R. p. 307.)

12-24, FIREMAN—RATES OF PAY, MCH. 1-AUG. 31, 1928

Showing rates originally paid and Rates used in adjustment of Sept. 1928.

COL. A — Broken Assignments	COL. B.
Rates paid before Sept. Adjustment	Rates used in Sept. adjustment
The monthly rate was $146.35	The monthly rate was $146.35
Daily rate for 8 hour day—21 watches 21 12-hr. watches= 31-½ 8-hr. days *$145.35 ÷ 31-½= $4.646	Daily rate $5.6109 146.35 x 12 months= $1756.20 divided by 313 working days This formula prescribed by Rule 2 (a) of the agreement, and is the same daily rate as paid to 8-16 hr. firemen.
Daily rate for 8 hr. day—20 watches 20 12-hr. watches = 30 8-hr. days $146.35 ÷ 30 = $4.8783	
Hourly rate—arrived at under Rule 9 of agreement—12 months x $146.35= $1756.20 divided by 2920 hrs. (or 8 x 365) = $.6014	Hourly rate .... $.7014 $146.35 x 12 months = $1756.20 divided by 2504 hrs. the no. of hours in 313 8-hr. working days is formula prescribed by Rule 9 (a) of agreement and is same hourly rate paid to 8-16 hour firemen.

*Misprint for $146.35.

It follows that the "broken assignment" men by the final adjustment were paid full 8-16 hour watch rates as found by the trial Court.

Another error in which appellants persist and a fallacy that underlies their entire claim consists, basi-

cally, in ignoring the provision that existed in Rule 6 of the original contract and in Rule 6 of that contract as amended by the award that the "8-16 hour" men who worked on "assigned crews" were not merely to work 8 hours on watch and then 16 hours off watch but that they were to work "eight hours or less *each day for six consecutive days*", and that the same requirement for 8-16 hour men was continued in effect by the arbitration board.

That fallacy was clearly perceived and expressed by the trial judge. His discussion in his opinion (R. pp. 99-104) emphasizes the contractual necessity for an 8-16 hour assigned watch to be *eight hours per day for six consecutive days.* The thought is re-inforced by his special findings. (See Finding II, R. pp. 119 and 120 and Finding IX, pp. 127 and 128.)

The terms of the written agreement of 1925 between the men, represented by the union, and the railroad are undisputed. The agreement is Exhibit A to the answer (R. p. 68) and was received as Plffs. Ex. 2. (R. p. 146.) The arbitration award is embodied in the judgment and may be found at pages 24-34 of the record.

The arbitrators did not re-draft the contract; certain sections and certain sections only were before them in the agreement to arbitrate (R. pp. 81-87) as "specific questions submitted to the board for decision." (Para. "Fourth", R. p. 82.)

The award, therefore, operated only as an amendment of the original agreement of 1925; it left untouched and in full force and effect all of the sections of that agreement not specifically amended by the

award. Under familiar principles the agreement of 1925 as so amended by the award must be construed as a whole to determine what rights were created as well as what rights were preserved by the award.

The appellants blandly ignore the fact that under the agreement of 1925 as amended by the award the monthly pay of $146.35 for firemen and $139.40 for deckhands who worked on regular assigned watches was for a service of eight hours per day for six consecutive days, whereas their assignors did not work six consecutive days at any time.

In other words, to entitle a man on an assigned crew to a months pay under the agreement of 1925 as amended by the board, he had to comply with Rule 6 which reads, as amended:

> "Rule 6: Assigned crews will work on the basis of eight hours or less on watch each day for six consecutive days."

Thus the 8-16 hour men who continued on those assigned watches during the six calendar months in question or during any of those calendar months worked either 26 or 27 eight hour watches each month depending on the number of days in the month. (Defts. Ex. F, R. p. 258.)

But the 12-24 hour man—and all of appellant's assignors are of that class—who worked one or more calendar months during that period only worked 20 or 21 twelve hour watches a month. (Defts. Ex. F, R. p. 258.) The calculation is of a mathematical certainty; no exhibit was necessary but one was received (Ex. F ante) in the interest of clarity.

The 8-16 hour man received his monthly wage for 26 or 27 eight hour watches during that period. The 12-24 hour men received the same monthly wage for their 20 or 21 twelve hour watches, but—by their method of computation they want to credit the carrier with the monthly wage for the first eight hours only of each of those 20 or 21 watches when the 8-16 hour men worked 26 or 27 watches for the same monthly wage; then the appellants want four hours overtime for each of those 20 or 21 watches. That is where the plaintiffs' assignors gain the 18% differential over the 8-16 hour men that we reviewed earlier in this chapter, and is absolutely against the spirit of the award as well as contrary to its text.

There was no 12-24 hour assigned watch left in Rule 6 when the Board got through with that rule. But its award was in suspense during the impeachment proceedings. The result of the final affirmance of the award was by the stipulation made retroactive to March 1, 1928; it follows that for the purpose of the final adjustment in October, 1928, those 12-24 hour assignors to the appellant were required to be treated as having worked during the six months without any rule in the Agreement of 1925 as amended that provided for a 12-24 hour watch. During those six months the 12-24 hour men were paid currently the monthly wages as increased by the award where the 20 or 21 twelve hour watches were worked in a calendar month, and, on broken assignments a daily wage was paid computed on the 12-24 hour watch basis as illustrated in the table on R. p. 307. (See table in Finding XIII, reproduced *ante*.) It was well understood by them that if the award was upheld "the retroactive

date of the new watch rules which are a part of that award shall be advanced from November 1, 1927, to March 1, 1928." (Stipulation, copied into Judgment, R. p. 29.) If the award had not been upheld they would have been fully paid during those six months.

They had "bid in" for these 12 hour watches (Deal, R. p. 289)—"bidding in" being a well recognized term in labor contracts to describe the preference senior men may exercise for vacancies that occur in positions. They were not employed from day to day; "the 12 and 24 hour boats kept running until about September 1st". (Deal, R. p. 289.)

How then could it be expected that in adjusting their pay for the six months of March-August, 1928, they would be paid on any other basis than the 8-16 hour men? The rule abolishing 12-24 hour watches was then, by stipulation, retroactive to March 1, 1928. Those 8 hour men had given 26 or 27 eight hour days for a month's pay. Why should the company pay the 12-24 hour men a month's pay for 20 or 21 eight hour watches plus pay at the hourly rate for 80 or 84 hours overtime?

Appellants attempt to justify this by Rule 8 which was not changed by the award. At all times Rule 8 read that the monthly salary covered *"the present recognized straight time assignment"*, and that overtime was *"service hourage in excess of the present recognized straight time assignment"*. Appellants' argument under Rule 8 is self-destructive because the only "present recognized straight time assignment" *in the agreement of 1925 as amended by the award* was the 8-16 hour assignment under Rule

6 as amended which required eight hours or less on watch each day "for six consecutive days" and none of plaintiff's assignors worked six consecutive days.

It was impossible to apply Rule 8 to the 12-24 hour men who had worked during that six months. They were not, in any sense, 8-16 hour men and the testimony and argument that 8-16 hour men were always paid overtime for hourage over 8 hours in any one day has no bearing at all on the claimed obligation of the company to treat each 12 hour watch as a unit consisting of one 8 hour day and 4 hours overtime regardless of the fact that the man, under that construction would receive a month's pay for 20 or 21 eight hour periods. The trial judge saw the injustice and lack of equality in such a result, as his opinion and findings show. Moreover, when the method of actual payment had been explained to him he saw and found that the plaintiff's assignors had received exactly the same pay per eight hour day and per hour worked as the 8-16 hour men.

In this connection we ask the Court to examine the tables in Findings XII, XIII, XIV and XV (R. pp. 131-134), also one of the tabulations in the opinion (R. p. 108) which does not appear in the findings. The tables just referred to summarize the defendants' testimony and show that the amounts paid each of the plaintiff's assignors prior to the final adjustment check, plus that check, gave him exactly the money he would have received if he had been on a regular assigned 8-16 hour watch, but had worked the same number of twelve hour watches he actually worked as a 12-24 hour man.

III.

THE "HANCOCK FORMULA" SO CALLED BY APPELLANTS' BRIEF WAS NECESSARY, SIMPLE, FAIR AND COMPLIED WITH THE AWARD.

That formula is reproduced in Finding V (R. pp. 123-6) and in evidence as Defendants' Exhibit A. (R. pp. 220-2.) Witnesses Hancock (R. pp. 223-6; 241-2; 247-51) and Gorman (R. pp. 252-269) testified orally before the trial judge and, to the extent that their testimony or explanations may differ from that of witness Deal, the secretary and manager of the union, we believe that on this appeal the findings based on their testimony should stand.

The situation was that under the agreement of arbitration the award of the Board as to rules was to be effective "on the first day of the month following the date on which the award was filed". (Arbitration Agreement, Sec. 11, R. p. 86.) The award was filed October 31, 1927 (Judgment, R. p. 24), and normally the new watch rules would have taken effect on November 1, 1927, as agreed to. (R. p. 24.) But the carriers desired to and did on November 9, 1927 (R. p. 28), file a petition to impeach the award, a privilege granted them by Section 9 of the Railway Labor Act and the petition being denied on February 9, 1928 (R. p. 28), by the District Court, they appealed to this Court. That petition for impeachment and appeal resulted in a preservation of the *status quo*. Pending the appeal and to adjust that situation on May 19, 1928 (R. p. 28) the carriers and the union stipulated in the proceeding (Stipulation, R. p. 28)

(1) that the $10 per month increase should be paid beginning May 1, 1928, to April 1, 1929, and thereafter until the contracts were modified; and (2) that the $10 increase should be retroactively paid to January 1, 1927. It is not claimed that this increase was not paid in accordance with the stipulation. Each of plaintiffs' assignors as well as the 8-16 hour men received that increase. (Finding IV; R. p. 123—unchallenged.) But the stipulation proceeded further and provided (3) (R. p. 29) that if the District Court's decree was affirmed "the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927"—the date when they would have taken effect but for the petition and appeal—"to March 1, 1928". Such a stipulation was permissible under subdivision "fourth" of Section 9 of the Railway Labor Act.

The "new watch rules" referred to established the 8-16 hour watch as the only regular assigned watch. Counsel admit (Brief, p. 25, line a) that "Under the award and judgment the men were entitled to a monthly wage based on "8 hours or less on watch for *six consecutive days"* and further quote the amended Rule 6 to support that statement.

During that six months' period the 12-24 hour men continued to work on their 12-24 hour assigned watches because no one knew whether the award would finally be affirmed. They were working under the, as yet, unmodified contract which in Section 6 specifically provided for 12-24 hour assigned watches. Those of them who worked each 12-24 hour watch during a calendar month received currently a full month's

pay at the increased rate. (Finding XII, R. p. 131.) There is no dispute as to that. Those 12-24 hour men who worked on "broken assignments"—that is less than the 20 or 21 "12-24 hour" watches that constituted a full month—were paid currently at the "12-24 hour" daily or hourly rate. (See Gorman's testimony as to Fireman Leimar (R. p. 254); also table in Finding XIV (R. p. 133), illustrating Leimar's basis of pay before the final adjustment. Also see Gorman's testimony at pp. 306-7.) If the award had been set aside by direction of this Court to the District Court, there would have been no occasion to make any adjustment with plaintiffs' assignors, because the 12-24 hour watch would have remained in effect and they had been fully paid on that basis, plus the $10 increase, each month during the six months here involved.

When it became the duty of the management, represented by Mr. Hancock, to make the adjustment after final judgment, he had before him paragraph 3 of the stipulation providing in effect that adjustment should be made as though the *exclusive* 8-16 hour assigned watch had been in effect during the six months period and as though no 12-24 hour assigned watch had then been in effect. But the 8-16 hour watch provided for "six consecutive days" work as well as for 26 or 27 eight hour watches per month, while the 12-24 hour men whose wages he was adjusting for the six months, retroactively, had worked on the basis of an assigned watch that produced only 20 or 21 watches per month and none of them had worked six consecutive days.

Accordingly, he provided in the formula (R. p. 221, also Finding V, R. p. 124) that:

> "Employes who served on twelve (12) hour watch assignments (56-hour week) are entitled to the benefits of forty-eight (48) hour week, in way of additional compensation, commencing with March 1st, 1928. That is (except on Fire Boats where there is no change), they should receive the same compensation as would have accrued to eight (8) and sixteen (16) hour assigned men, working the same number of hours."

And the remainder of the formula was devised to produce exactly that result. The tables in the opinion and the findings and Defendants' Exhibits D (R. p. 255) and F (R. pp. 258-9) as well as the Hancock and Gorman testimony above referred to show that conclusively.

Referring again to those tables:

There are but two classes of 12-24 hour men involved—those who worked all of the 20 or 21 assigned watches per month and those who worked less than that number, i. e., "broken assignments".

The trial Court correctly found (Finding X, R. p. 129) "that under the adjustment made by the formula the hourly and daily rate of compensation of the 12 and 24 hour men was exactly the same as that of the 8 and 16 hour men".

The essential weakness in appellants' argument is that they insist that a 12-24 man who worked but 20 or 21 watches per month was entitled to the same monthly salary for the first eight hours of those 20 or 21 watches as that paid an 8-16 hour man for 26

or 27, eight hour watches during the same month and was entitled in addition thereto to four hours overtime for each 12 hour watch.

What the carrier did by the final adjustment was to pay the 12-24 hour man enough so that his total pay *for each month* during the six months equalled the eight hour daily pay of an 8-16 hour man for the first 8 hours of each 12 hour watch, plus four hours overtime at the 8-16 hour man's rate for the remaining four hours.

In other words, in the case of a 12-24 hour fireman the final adjustment resulted in his being paid $5.6109 —the daily rate for an 8-16 hour fireman—for the first 8 hours of each 12 hour watch he worked plus $.7014— the hourly rate for the 8-16 hour fireman—for each of the remaining four hours of each 12 hour watch he worked. This is demonstrated by the tables in the findings. (R. pp. 131 et seq.) It is attacked on the "daily unit" theory which, as we show elsewhere, would result in an 18% + hourly differential between the two classes of men and in favor of the 12-24 men, when, as we further show and as the Court found, one of the objects of the arbitration was to equalize the hourly pay of the two classes.

IV.

CORRECTION OF SOME MISSTATEMENTS IN APPELLANTS' BRIEF.

The appellants' brief is so pervaded by misstatements and misapplication of the rules that to answer it in detail would almost require the analysis of each sentence. We call attention to a few of the outstanding distortions of the record.

On page 26 it is incorrectly stated that the award is

> "that the men get a monthly salary which covers the straight time of eight hours, and 'in addition to the monthly salary' (to use the words of Rule 8) to be paid for all hourage in excess of eight at the pro rata rate."

Rule 8 was unchanged by the Board of Arbitration; it says nothing about 8 hours. Rule 8 (R. p. 72) provides that "service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate". It must be read in connection with the *amended Rule 6,* which by stipulation was made *retroactive* during the six months in question, and under which there was but one recognized straight time assignment, namely, not less than 8 hours per day for six consecutive days. The plaintiffs' assignors were not on any such assignment; they were on a 12-24 hour basis, which was a "recognized straight time assignment" during those six months; therefore the rule is against counsel rather than in favor of them.

On page 26 they quote Mr. Hancock's testimony as sustaining their statement "It has always been

the practice to pay overtime for hourage in excess of 8 hour watches", but the very quotation they make shows that Mr. Hancock said (R. p. 242):

> "If a man's regular assigned hours were eight hours and he worked in excess of that, unless it was provided for in an agreement, he would receive overtime at a pro rata rate."

The "regular assigned hours" of plaintiffs' assignors were twelve hours—not eight hours.

The testimony on this subject is so clear and uncontradicted that it is surprising to find counsel attempting to give the Court the impression that any overtime was ever paid for hours worked in excess of eight except to men working on a regular assigned 8-16 hour watch which as defined by Rule 6 (both before and after the award) was to be eight hours or less for six consecutive days.

Appellants' counsel are under no illusion as to this whatever may be the inference they seek to have the Court draw from their brief. We quote from the cross-examination of Mr. Hancock as condensed in the record (p. 248):

> "Mr. Sharp called the attention of the witness to his testimony that it has been the uniform rule and practice since 1918 to date that where a man is assigned on an 8-hour watch, but as a matter of fact on any particular day he works in excess of 8 hours, he is entitled to overtime for that excess at a prorate basis, and asked whether that meant an 8-hour regular assigned watch. The witness replied: 'I mean or had reference to an eight hour watch that was a part of the regular eight hour assignment. In other words a man—

or the assignment upon which the man served was that normally for 6 days a week. Now, you will remember that in the case before us these men did not work every day of the week'. If his regular assigned watch was exactly eight hours and he worked in excess of eight hours, then he would receive overtime at the prorate rate for the excess time worked. So that if on a particular day a man is assigned to an eight hour watch and works, say, nine hours, he is entitled to one hour overtime at the rate of 7014 and by the same token, if that man was on an eight hour, 6 day assigned watch and worked 12 hours, he is entitled to four hours overtime, if he was on an assignment of that kind, a daily assignment. Where a man is assigned to an 8-hour watch, each hour he works in excess of 8 hours is overtime, where it was a part of an assignment of 6 days per week.

The men were assigned on the 12 and 24 hour basis during the period the case was in court and the men were assigned to those watches by the company. All the men involved in this controversy were during the period in controversy assigned by the company to work on the 12 hour watches in the number set out in the exhibit. The men bid in the 12-hour watches and were so assigned to them. But the company assigned the watches. During the entire period in controversy the men worked on 12-hour watches which were assigned by the company." (Meaning by the last sentence that the *boats* operating on the 12-24 hour watch basis were designated by the company.)

On page 27 of appellants' brief it is said:

"The rule provides that the monthly salary shall be for the assigned time, and the testimony

> is without conflict that it was the company that made this assignment (R. p. 249), and that was the full assignment made by the company. If the company chose to assign these particular men on a system of watches which in effect required the men to work only 21 watches instead of twenty-five, twenty-six or twenty-seven watches a month, that was the company's doing, not the men's doing."

But under the amended contract there was only one class of straight time assignment provided for; that was by the amended Rule 6, which provided for 8 hours or less per day for 6 consecutive days and that under the amended contract is the only straight time assignment to which the monthly salary applies. There is no provision made in the amended contract for applying the increased monthly salary to 12-24 hour watches because those watches are not provided for in the agreement as amended by the award except in certain exceptions to Rule 6 which are not applicable here.

Counsel ignore the fact that for many years and until September 1, 1928 there were two classes of boats —those operated on the basis of 8-16 hour watches and those on the basis of 12-24 hour watches. The men on the second class of boats had "bid in" for their 12-24 hour assignments (Deal, R. p. 289; Hancock, R. p. 249)—that is, because of their seniority under Rule 17 of their agreement (R. p. 74) they were entitled to and had exercised the preference of filling vacancies in these "barbarous" 12-24 watches when such vacancies were bulletined under Rule 14. (R. p. 73.) Thus the

men had "assigned" themselves to the "inhuman" 12-24 hour watches prior to the award and merely continued to work on them during the six months in question because the watches on those boats were not readjusted to the 8-16 hour basis until the final judgment was entered. "The 12 and 24 hour boats kept running until about September 1st." (Deal, R. p. 289.)

We repeat that during the six months in suit the award was in suspense; the old Rule 6 remained in effect. That rule specifically authorized both 12-24 and 8-16 hour watches and Rule 8 provided for overtime only when a man worked more than the 12 hours on a 12-24 hour watch or more than the 8 hours on an 8-16 hour watch. The stipulation made pending appeal to this Court was all that made the amended Rule 6 retroactive during those six months. If an affirmance of the award by this Court would have had that effect by its own force, the stipulation would have been unnecessary. Counsel recognized that by exacting Paragraph 3 of the stipulation as one of the conditions for advancing the effective date of the award from November 1, 1927 to March 1, 1928.

But even if the award, on its final affirmance became retroactive *ex proprio vigore,* it was nevertheless suspended during appeal and 12-24 hour watches were entirely proper.

Counsel then say that the company was "gambling" on the fact that it could continue to work the men on the 12-24 hour watches. The company had the legal and moral right to follow to a conclusion the steps

provided for in the Railway Labor Act and, moreover, it did by the stipulation put the $10 per month increase into effect irrespective of what the subsequent decision of this Court might be. Counsel next claim (p. 28) that the carriers violated their agreement, meaning, we suppose, the arbitration agreement, but the arbitration agreement was entered into under a statute which provided for judicial review and it was no violation of the agreement to preserve the *status quo* until that review could be had. These are lame excuses, indeed, for attempting to apply a monthly rate based on 26 or 27 eight hour watches per month to the first eight hours of each of 20 or 21 watches per month.

The Hancock formula is referred to on page 30 as intricate; in reality, as we show in Chapter III, ante, it was a very simple formula and was designed to and did give the 12-24 hour men on the final adjustment just what the 8-16 hour men would have received had they worked the same number of watches and the same number of hours on each watch as the 12-24 hour men.

It is said on page 31 that we admit that the formula did not pay "overtime" for the last four hours of the 12 hour watch. But whether the payment was called overtime or additional compensation would seem to make no difference; the fact remains that the 12-24 hour men for the six months in question got exactly what they would have received if they had been paid the 8-16 hour daily rate for the first 8 hours of the watch and the 8-16 hour overtime rate for the other

4 hours. We show that over and over again in this brief and the trial Court so found. (Finding XI, R. p. 130.)

The argument in parallel columns on page 34 is incorrect in important respects. The left-hand column entitled "What the Judgment gave the Men" assumes that each 12-24 hour watch consisted of "8 hours straight time covered by the monthly salary and 4 hours overtime". That is not true, as we have shown, and therein lies the fallacy of the entire table, which consists in assuming that the 12-24 hour man was entitled to the amended contract monthly salary, for the first eight hours of each of 20 or 21 watches a month, when that monthly salary, under the amended contract, applied only to an assigned man working 26 or 27 eight-hour watches. Plaintiffs' assignors did not work that many watches in a calendar month and therefore it is incorrect to start the table on page 34 with the assumption that the 20 or 21 watches should be compensated for on a basis applicable only to 26 or 27 watches, namely, the monthly basis. They persist in this error by saying on page 35 that under Rule 8 the monthly rate covers straight time "that is to say the 8-hour portion of assigned watches". We have already shown that it covers only assigned watches provided by the amended contract and there was but one assigned watch provided for by that contract, namely, 8 hours or less per day for six consecutive days, a watch that none of plaintiffs' assignors worked during any month.

If counsel say that our analysis of counsel's table on their page 34 is incorrect, then they must admit that for the first 8 hours of each 12 hour watch the 12-24 man was entitled to receive the daily pay of the 8-16 hour man, which in the case of a fireman was \$5.6109 (deckhands are exactly comparable except for the amount), and that amount was by the final adjustment actually paid for the first 8 hours of each 12 hour watch as shown by the findings and the table therein.

Again, counsel say on page 38 that we worked men in violation of Rule 6,—we suppose Rule 6 as amended by the award. But there was no *amended* Rule 6 in practical and operating effect until the award was finally affirmed by the District Court on direction of this Court, and while these men were continuing to work on the 12-24 hour watches for which they had expressed preference by "bidding" they were working under a contract that specifically provided for those watches.

Again, on page 39 they revert to their argument that the "formula did not pay overtime for the last 4 hours of each 12 hour watch *as such*". We have shown, and the evidence is conclusive on the subject, that the men, plaintiffs' assignors, were paid an amount which included the same amount that would have been paid for those 4 hours if we had paid the first 8 hours on the daily 8-16 rate and the last 4 hours on the hourly 8-16 overtime rate.

Point 3 on page 42 of the brief takes up some remarks by defendants' witnesses and counsel and en-

deavors to give the impression that no man was paid overtime until he had worked 48 hours in a week. But Mr. Hancock's testimony quoted by counsel means merely that in arriving at the basis of the final judgment it was considered that where a man had worked an entire month 48 hours per week were covered by the monthly salary. That is all that means and nothing more. This is shown clearly by the Conrad Anderson case where Anderson worked only one 12 hour watch in August, 1928. (Table, Finding VIII p. 132.) He was paid by the final adjustment $8.41 for that watch, which was equal to one day at $5.6109 —the 8-16 hour daily rate—plus 4 hours overtime at .7014 per hour, the 8-16 hourly or overtime rate. It is further shown on the succeeding table in Finding XIV (R. p. 133) in the case of fireman Leimar, who in April, 1928, worked but one watch and received by the final adjustment $8.40, arrived at in the same way as in the one watch of Conrad Anderson. The question of overtime for hours or parts of hours on watches worked in excess of 12 hours is not involved in the case. That is admitted. (R. bot. p. 25.)

The foregoing are but a few of the many misapplications of rules and testimony that occur in appellants' brief. These no doubt were brought about by the exigency of trying to show that these men should receive credit for a full month's pay for the first 8 hours of but 20 or 21 eight hour periods of duty during the month and that they should have a pay adjustment that would give them an 18% differential over the 8-16 hour men who were working in the same class of service at the same time 26 or 27 eight hour watches for six consecutive days each week.

V.

PLAINTIFFS' LACHES SHOULD BAR RECOVERY.

Appellants are insistent that their proceedings against each of the appellees are in equity. Equity does not countenance stale demands and lack of reasonable diligence. (21 *Corpus Juris,* p. 212, para. 212.) And yet—to quote from the opinion of the trial Court (R. p. 111):

> "The checks were dated September 30, 1928. On January 9, 1929, counsel for the union made written demand upon the carriers for payment of additional overtime as contended for herein. On October 2, 1931, the employes assigned to the union all claims due them from the carriers, expressly including the claims for wages 'from March 1, 1928, to and including December 1, 1928', and all rights which assignors had by reason of the judgment of this Court entered on September 29, 1928. It was not until September 27, 1933, that these proceedings were commenced, *two days short of five years after entry of judgment, a delay suggestive of laches.*"

The written demand referred to was in the form of letters dated January 9, 1929, more than two months after the overtime checks were cashed. The letters appear at pages 193-199 of the record. They contain no offer to restore or repay all or any part of the moneys which according to the endorsements on the checks were receipted for "as an acknowledgment of receipt of payment in full of account as stated within". (S. P. check, R. p. 229; N. W. P. check, R. p. 230.)

The carriers' replies were by letters January 17, 1929 (R. p. 200) and January 22, 1929 (R. p. 201), respectively, which unequivocally stated that the award had been fully complied with.

Not until September 27, 1933, almost five years after the checks were cashed, did the union belatedly attempt to assert its supposed rights as assignee on the equity side of the Federal Court by the three proceedings described in Finding VII. (R. p. 126.)

Nor should it matter that action was brought in the State Court for the amounts involved in the instant case, although there is no evidence in the record before this Court that such an action was brought. Counsel say—gratuitously—on page 4 that they sued in the State Superior Court and that "that court erroneously refused to take jurisdiction on the ground federal legislation was involved"; further (Brief, p. 20) that the Superior Court "decision was affirmed by the District Court of Appeal but set aside by the Supreme Court of the State of California where it is still pending". Parenthetically—if we may be permitted the same extra-record liberties that counsel take—the union filed a bill in equity in the Superior Court on March 6, 1931 and changed it to an action at law by amended and supplemental complaint filed October 29, 1931. But resort to the State Court and pursuit of a supposed remedy at law therein aggravated rather than palliated or excused the manifest laches in the union's failure to pursue its supposed remedy or remedies on the equity side of the Federal Court for nearly five years after its assignors received and cashed their overtime checks.

Interest.

Appellant proceeds on the equity side of the Court and asks, not only for additional payments for overtime, but also for interest. Interest is allowed in equity as a matter of discretion, not of right.

Certainly, even if, as the trial Court strongly intimated and as we believe, the plaintiff's laches has not barred it from relief in equity—and it is that form of relief to which its pleadings bind it—equity should not, in view of the great delay, penalize it with interest if this Court should find it entitled to judgment for the principal of the additional payments it seeks. Even that recovery, as we elsewhere endeavor to show, lacks any support in the evidence or in law.

VI.

THE FINAL JUDGMENT AFFIRMING THE AWARD WAS NOT A LIQUIDATED DEMAND IN FAVOR OF THE UNION, AND THERE WAS NO JUDGMENT THAT COULD BE SATISFIED BY THE UNION.

Partly in support of their position that these are suits or actions on the judgment and partly to claim that there could be no accord unless the union was a party to it the appellants claim that the judgment was a "liquidated demand" and that it was in favor of the union.

Neither position is correct. The Railway Labor Act of 1926 provides a system of collective bargaining by employes, by classes, through representatives chosen

by a majority of the class. The representative—in this case the union—is merely an agent or attorney in fact. The agent has no proprietary interest in the fruits of the bargain; he represents the minority which did not vote to select him as well as the majority which did. That is made plain by the Chief Justice in *Texas and New Orleans R. R. v. Brotherhood etc.,* 281 U. S. 548, on page 570, the first authoritative construction of the Railway Labor Act of 1926.

That act was amended in 1934 and as amended is printed in the loose-leaf supplement to Title 45, U. S. Code, Ann. The original act is 44 Stat. 579, Title 45 U. S. Code, 1928 ed. Chapter 8, Sections 151 et seq. Throughout the act the theory is carried out of classes of employes dealing through "representatives" of their own selection; the representative may be an individual or as in the case at bar an unincorporated association. When the act came to its provisions for arbitration it provided (Section 8, 44 Stat. 584) that the agreement "shall be signed by the duly accredited representatives of the carrier or carriers and the employes".

That section was strictly followed in the instant case. The agreement to arbitrate (R. p. 81) was made between the carriers "and the marine firemen, deckhands * * * as *represented* by the Ferryboatmen's Union of California". That representative could have no financial or proprietary interest in the monthly wages or in pay for overtime. It might acquire such interest by assignment—as it did subsequent to the final judgment—but its legal position as assignee is no different from that of an assignee for value or an

assignee for collection. Under the Railway Labor Act a carrier is "open shop" but a mere majority of the employes of a given class may constitute a Brotherhood or union the representative of all of that class. That is the very heart of the principle of collective bargaining.

The union did not institute a suit against the carriers to have the award made final. The finality would have been automatic under Section 9 of the act (Section 159, T. 45, U. S. Code, unchanged by Amendments of 1934) had it not been for the petition filed by the carriers under Section 9 to impeach the award. The proceeding to impeach was entitled *in rem.* (R. p. 1.) The union merely acted as the employe's representative in that proceeding and in the appeal to this Court. It acted for all employes of the classes affected—its own members as well as non-members. It did not become a plaintiff until on September 25, 1933, it filed the three pleadings in the District Court here under review. (R. pp. 1-11-336.)

As the result of the appeal came the final judgment (R. pp. 23 et seq.) affirming the award.

We ask the Court to read Section 9 of the act (Section 159, Title 45, U. S. Code) and then read the *Texas and New Orleans* case, supra (281 U. S. 485), and the opinion of the Circuit Court of Appeals of the Fourth Circuit in *Malone v. Gardner* (1932), 62 Fed. (2d) 15. From them the conclusion cannot be escaped that the judicial proceedings permitted by Section 9 of the act are unknown to the common law and to equity; that they are of a special character and that the jurisdiction of the Court is very strictly

limited. It cannot affirm a separable part of the award and reject another separable part. It must either affirm or annul the award as an entirety. (Section 9, Subd. "Fourth".) The scope of the proceeding is strictly limited by subds. third and fourth of Section 9.

We think that it must follow that the portions of the final judgment directing payment "of all overtime due or to become due in accordance with said Rule 8" (R. p. 33) and to pay "all back pay retroactively or otherwise due to said employes or any of them in accordance with said award and this judgment" (R. p. 34) are merely surplusage, and that the rights of the employes to additional pay for the services rendered March *to* September, 1928, once the award had been judicially affirmed under Section 9, were based entirely on and flowed exclusively from the Agreement of 1925 as amended by the award and as retroactive to March 1, 1928, only, as stipulated to pending appeal by the employers and the representative of the employes. These rights were individual to each employe. The Railway Labor Act nowhere authorizes the employes' representative to *collect* wages and there is nothing in the record to show that the employes had delegated that right to the union.

Counsel lay great stress on the statement of the Chief Justice on page 564 of the *Texas & New Orleans Railroad Co.* case (281 U. S. 548) that "Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as such," which is qualified by the subsequent statement on page

569, after, referring among other things to arbitral awards, that "in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each".

The Chief Justice did not hold that the impeachment proceedings were in equity or that judgments affirming awards were decrees in equity or judgments at law. While giving complete finality to an award which had been affirmed by judgment—either as the result of or without impeachment proceedings—he assumed, no doubt, that aggrieved parties would resort to the proper forum and adopt the proper procedure for asserting and enforcing their rights.

But if the portions of the judgment above quoted be treated as valid they merely run in favor of the individual employes as their interests might appear under the award and stipulation.

The judgment did not constitute a "liquidated demand" in the sense of being a money judgment.

"To liquidate a claim is to determine by agreement or litigation the precise amount of it" said District Judge Sibley *In re Cook,* 298 Fed. 125-6, quoting Webster's International Dictionary and Bouvier's Law Dictionary.

Appellants themselves recognized this in the trio of instant proceedings which are, a motion for reference to a commissioner to ascertain the amounts due, an ancillary bill in equity to enforce decree and an original bill in equity to enforce decree.

And if there was a judgment in either liquidated or unliquidated form in favor of the union why did

the union find it necessary to take assignments from the 12-24 hour men? (Complaint, par. II, R. p. 21.)

Even treating the judgment as in all of its parts *fully* effective and mandatory, the trial Court correctly found (Finding XVIII, R. p. 136):

> "The judgment was not a liquidated demand but necessitated an interpretation of the award. The judgment was not one for which the union could enter satisfaction of record, as the individual employes were the actual judgment creditors of the company."

The necessity for many pages of evidence, exhibits and argument to set forth the respective contentions of the men and the carriers as to this back-pay is the best evidence that the final judgment did not create a *liquidated* demand in favor of any one—least of all the Union.

We think the conclusion inescapable that the union is suing merely as assignee of certain unliquidated claims under the amended contract and stipulation, and that its assignors had full competency prior to that assignment to enter into an accord and satisfaction or execute a release of those claims—the amount of which—as we show in the next chapter—was in dispute through their authorized representative.

VII.

DEFENSES OF ACCORD AND SATISFACTION AND RELEASE.

In their answers in the several proceedings defendants specially pleaded the defense of "accord and satisfaction" as well as a "release". (Southern Pacific Answer, R. pp. 39-91; Northwestern Pac., R. p. 91.) The trial court found "there was a dispute concerning the amount due and that payment was accepted in full satisfaction thereof. * * * The facts and circumstances are sufficient to sustain the defense of the carriers of an accord and satisfaction and of a release". (R. p. 137.)

Whether there was a dispute was primarily a question of fact for the trial Court to determine. The cases cited in appellants' brief (p. 54) so hold. (*Lapp-Gifford Co. v. Muscovy Water Co.,* 166 Cal. 25, 27; *Berger v. Lane,* 190 Cal. 443-452; *B & W Engineering Company v. Beam,* 23 Cal. App. 164-171.)

The Court saw and heard the witnesses and was justified in finding that before the final checks were issued Mr. Deal had demanded payment on the theory sued upon. Even Mr. Deal admitted:

> "I approached Mr. Hancock and told him that in my opinion that for each 12-hour watch worked the men were entitled to 4 hours' overtime. * * * (R. p. 205.)
>
> Q. Now do you recall whether or not any one representing any of the organizations made the statement at one of these meetings that the Ferryboatmen believed they could collect 4 hours' overtime for each day on which they worked 12 hours?

A. I remember quite distinctly making that statement myself. (R. p. 214.) * * *

Q. Didn't Mr. Hancock say we did not agree to that?

A. I don't recall. He may have said that. I do not recall him saying that at all. I think Mr. Hancock's attitude was always this, and I think it is possibly a very fair attitude, that 'We will pay the men what we think they are entitled to what the award says they should be paid, and if there is anything wrong we will take it up afterwards, as we have done in the past'. I think that was the sum and substance of his statement. And I do know this much, that Mr. Hancock did not care to argue the matter at all. I just got that impression." (R. p. 215.)

Mr. Hancock testified:

"Q. What is your recollection with regard to any claim that was made by Mr. Deal as Secretary and Manager of the Ferryboatmen's Union early in 1928 regarding the claim of the Union that they were entitled to overtime during the 6 months in question here, on the basis now sued on?

A. On several occasions Mr. Deal mentioned that he thought they would be entitled to overtime after the eighth hour for each 13-hour (*should be '12 hour'*) watch that had been worked.

Q. What do you recall about that, if anything?

A. Well, my recollection of it was that I did not see any justification for the claim." (R. pp. 218-219.)

This testimony clearly shows that not once but a number of times Mr. Deal spoke to Mr. Hancock

concerning his theory of payment for the extra four hours. The testimony indicates with equal clearness that Mr. Hancock did not agree with him and plainly shows a dispute between the parties prior to the issuance of the final adjustment checks as to the amounts to be paid; the men having accepted and cashed the checks, all of the elements of an accord and satisfaction were present even under the authority of the decisions cited by appellant on page 54 of his brief. There being a dispute, the acceptance, cashing of the checks and retaining the money makes a clear case of accord and satisfaction; there was a dispute and something less than demanded was offered and accepted. On the reverse side of each check were the following words:

> "Endorse here. This voucher is endorsed as an acknowledgment of receipt of payment in full on account as stated within..................................Payee." (R. p. 244.)

The forms of the final adjustment checks are given on pages 228-231 of the record, immediately preceding which will be found (R. pp. 226-7) the following stipulation:

> "Mr. Booth. I have here, if the Court please, photostatic copies of the payroll vouchers as issued, or, rather, a sample of each payroll voucher issued, both from the Southern Pacific Company and the Northwestern Pacific Company and in connection with our defense of payment and also in connection with our defense of *relief* (release) and our defense of accord and satisfaction, I should like to offer these in evidence with the understanding that counsel will stipulate that

all of the plaintiffs' assignors were paid by the respective companies by the same form of payroll voucher, and that they endorsed them on the back over the word 'Payee'. The same is shown on these photostats.

Mr. Sharp. That stipulation will be made, but at the same time I will ask counsel to stipulate further with respect to these checks, that the vouchers used are the customary form of vouchers in use at that time and for many years prior thereto, except that there was printed thereon, on the Southern Pacific checks, the words 'For additional compensation account Arbitration Award between Southern Pacific Company and Ferryboatmen's Union, October 31, 1927, for March to August, 1928, inclusive'; and that the words 'For service as shown on payroll for period indicated herein' were deleted; that with respect to the Northwestern Pacific check, the form is identical with the customary form used, first, except that the words, in rubber stamp, were placed thereon 'August 31, 1928, account wage adjustment'. The rubber stamp was 'Balance due for period March 1, 1928 to August 31, 1928, account wage adjustment'.

Mr. Booth. The stipulation is that the companies took their ordinary forms of payroll voucher and in the case of the Southern Pacific Company they stamped on there what the counsel has read, and in the case of the Northwestern Pacific stamped what counsel has read, thus making what may be argued to be a special form of voucher."

After the sample checks were introduced (R. pp. 228-231) Mr. Hancock, referring to the special en-

dorsements on the faces of the checks relating to the account for which the checks were tendered, as recited by Mr. Sharp, testified:

> "Q. Did you have anything to do with directing these special endorsements to be put on the Southern Pacific vouchers?
>
> A. Yes, sir.
>
> Q. Now, it was prior to that time that you had these conversations with Mr. Deal in which the claim here was asserted and this claim brought out for four hours' overtime on these 12-hour units?
>
> A. Yes, sir.
>
> Q. Will you say whether or not it was because of that attitude on the part of the representative of the men which caused this to be put on the voucher?
>
> A. Yes.
>
> Q. It was?
>
> A. Yes." (R. pp. 231-232.)

As summarized in the record Mr. Hancock said (R. p. 237):

> I did not say they were making claim for overtime on a certain basis. I was given to understand they contemplated making some technical claim and it was for the purpose of forestalling those things that I changed the form of the check. I did not indicate to anyone representing the Union what was in my mind in this respect. I did not tell the Union I thought anything of that kind. I did not tell the Union or its attorneys or any of its representatives why we were *given* (*giving*) checks on a special form.

Mr. Hancock further said on cross-examination (R. p. 234): "These were a special check and issued for the purpose of disposing of the controversy and payment of the compensation that was due under the award." That intention could not have been more plainly expressed when the statements on the front and back of the check are read together. Not one of the men came forward to say he did not so understand it.

While Federal Courts are not bound to follow State Court decisions on principles of general jurisprudence or common law, and particularly in equity cases,* it appears to be well settled in California that when there is a dispute and something less is accepted in full settlement there is an accord and satisfaction.

In *Lapp-Gifford Co. v. Muscovy Water Co.,* 166 Cal. 25, 31, the Court said:

> "It may be accepted as settled law that where a claim is in dispute and the debtor sends or gives the creditor a check for a less sum, which he declares to be in full payment of all demands the recognition thereof by the creditor constitutes an accord and satisfaction."

See also *Berger v. Lane,* supra (190 Cal. 443), citing the *Lapp-Gifford* case and *B. & W. Engineering Co. v. Beam,* supra (23 Cal. App. 164).

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*Note: Illustrative authorities are: *Colorado Yule Marble Co. v. Collins* (C. C. A. 8), 230 Fed. 78-81; *Adams Express Co. v. Croninger*, 226 U. S. 401 on p. 504; also 91 A. L. Rep. 743; 71 A. L. Rep. 1109; 57 A. L. Rep. 426. The rule is particularly applicable in Federal equity cases as illustrated by *Russell v. Southard*, 53 U. S. 138-147; *Neves v. Scott*, 54 U. S. 267-272; *James v. Gray* (C. C. A. 1st), 131 Fed. 401-408; *Fee-Crayton Co. v. Richardson-Warren Co.*, 18 Fed. (2d) 617 (cases cited on pp. 622 and 623).

Other jurisdictions go further and hold whether the claim is liquidated or unliquidated, or recovery is doubtful, that any sum of money paid, no matter how small, may form the consideration for an accord and satisfaction. (100 Am. St. Rep. 431; 20 L. R. A. 795, 798, 805.)

In *Swindell v. Youngstown Sheet & Tube Co.* (C. C. A. 6th), 230 Fed. 438, there was a dispute as to the amount due by a licensee for the use of a patent. The check was mailed with an accompanying receipt, and the patentee cashed the check and retained the money, but did not file or return the receipt, which in the opinion is called a "voucher".

The Court says (p. 443):

> "It was open to appellants to reject this offer, but they could not both accept and reject. The language of the check and that of the voucher plainly disclosed a conditional proposal to make a full and final settlement; and this could not be frustrated simply by presenting a new and enlarged account, with a credit thereon of the amount of the check. The retention of the money was an acceptance of the condition upon which it was tendered. The transaction thus comprised the essential and familiar elements of an accord and satisfaction."

The checks given appellants' assignors were cashed, and the money retained without protest.

Mr. Deal's testimony shows that he knew before the checks were cashed that checks were not issued on the basis for which he contended. He testified:

"A. Most assuredly. I knew the men had not received checks to equal that amount. (R. p. 206.) * * *

Mr. Booth. Q. So that these checks—didn't you understand these checks were for what the company contended was the proper allowance to be made for this difference between 8 and 12 hours on these watches?

A. That is correct.

Q. Yes.

A. Not the difference between 8 and 12, I don't understand anything about it, except that these were the checks that were supposed to cover overtime payments, in order to comply with the award and judgment. (R. pp. 209-210.) * * *

A. Well, it was quite obvious, looking at the checks, that I saw, that the 4-hour overtime had not been paid. (R. p. 215.) * * *

Q. * * * The difference was too great to allow of its having been paid?

A. I was quite convinced that it had not been paid, because it should, in my opinion, have been a much larger check." (R. p. 216.)

Mr. Deal further said on rebuttal (R. p. 280) that many of the men took up with him the question of cashing the checks, i. e., before they cashed them.

There is no evidence that the men returned or offered to return the money paid. No demand for an additional sum was made until the letters written by attorneys for the Union dated January 9, 1929; the demand in those letters was promptly rejected on January 17, 1929, by Southern Pacific Company and on January 22, 1929, by the Northwestern Pacific Railroad Company. (R. pp. 193-203.) Neither the men nor

Mr. Deal nor any one on their behalf complied with the company rules in filling out the company form used in cases where underpayment was claimed. (Plaintiffs' Exhibit No. 13.) (R. pp. 244-245.) Nor did they make any complaint or demand on Mr. Gorman to whom complaints in such matters were made by ferryboatmen.

The defenses here discussed were specially pleaded (Southern Pacific answer, R. pp. 58-61; the Northwestern Pacific answer was the same—Stipulation, pp. 336-7.) The plaintiffs sue on claims assigned by the payees of the adjustment checks long after the checks were cashed. Yet they produced no payee to testify that his signature was made through mistake or inadvertence or in ignorance of the effect of what he signed, or was procured through fraud, misrepresentation, duress or undue influence. C. W. Deal, the Secretary and Manager of the Union, saw the checks and admits that he knew they were not large enough to have been prepared on the theory now used as the basis of the instant litigation although he says he had previously advised Mr. Hancock what that theory was.

Moreover, Mr. Deal, Secretary and Manager of the Union, knew before the checks were cashed that the carriers had not agreed to his basis of final adjustment. He said on rebuttal (R. pp. 279-280):

> "When the company issued checks in the form, a sample of which is before the Court, many of the men took up with me the question of cashing the checks.

Q. And what did you do or say to them?

A. I told them to cash them, because——

Mr. Booth. We object to that as not binding upon the defendants here, not having been stated to them. We raised the defense of the checks being tendered in full payment of this account, and they have been acknowledged on the back in full payment of account. Now, I think it is obvious, under the decisions, what Mr. Deal, manager of the Union, said to his men in regard to the men cashing them, that was not communicated to us. I object to this on the ground that it is incompetent, irrelevant and immaterial.

Mr. Sharp. I want to show the exact situation. There was some point made by Mr. Booth, why they happen to use these forms, and I want to bring out by this witness, if I may, that after taking it up with me he was advised that was not necessary, that he could proceed and tell the men to cash them and let the attorneys take up any controversy afterwards and explain the full situation.

Mr. Booth. We object to the relevancy of the statement of counsel. Counsel introduced these forms (*referring to So. Pac. Form admitted as Plffs. Ex. 13, R. p. 245*) and I asked him if any of these forms were ever presented to the company and he said 'no'. (*Referring to Stipulation, top of R. p. 246.*)

The Court. Objection sustained." (*No assignment of error filed, R. p. 323.*)

Much stress is laid on appellees' practice in the matter of adjusting claims on ordinary pay checks. That practice was very frankly stated by counsel for the carriers.

We quote from the record, beginning at page 281:

"Mr. Deal. To the best of my knowledge the statement on the back of the check, Defendants' Exhibit B, 'This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within' has been there for the last 16 years. It was on the back of the checks regarding which I handled claims.

Mr. Sharp. Now in any of those cases was objection made to the treatment of the claim on the ground that the check was endorsed in full?

Mr. Booth. If the Court please, I want to interpose an objection here. Probably it will be argued later. But I object to any evidence as to the custom or practice of the company waiving the benefit of any release on the back of these checks, as irrelevant and immaterial. The fact that a man makes a practice of waiving the statute of limitations in cases, sometimes because it is a matter of good business judgment or comity or good salesmanship, is no bar to his setting up the statute of limitations when it is properly pleaded, and when it is relied on by him and not waived. It is not a question of estoppel in pais; this is a question of special checks and checks in a special form being issued, and the parties signing them and cashing them, and I think we are entitled to rely on this even though we may have waived that in the past as to other checks and other forms of payment.

Mr. Sharp. If the Court please, our contention in this regard would be that over a period of 16 years this identical form of alleged receipt in full has been used; that the men have for years come to rely on the fact that they can cash their

checks and get their bread and butter each pay-day without having to hold the checks up while the lawyers and accounting departments decide on the question of whether or not that is a receipt for payment in full. That has been the uniform procedure; they cash their pay checks, paid their bills, and live on it, and if there are any discrepancies it is straightened out thereafter.* That has been the practice that has continued in years past, and the men took the checks and cashed them, because they knew if there was any discrepancy it could be straightened out afterwards with the company.

The Court. Isn't there evidence in the record already as to that condition obtaining, Mr. Booth? I think some evidence went in without objection.

Mr. Booth. Yes, there is evidence that where time has been omitted from the pay check this form was used and the mistake was rectified. But I do not think that precludes the company from raising the defense, and I think it is not relevant to any claim that the defense has been waived in a wholesale case such as this, where the company puts a special endorsement on the checks and issues them in the face of a prior claim that more money is or may be due, and the checks are cashed. We have a peculiar situation which I think is not disposed of by prior practice. I was perfectly willing to admit what the prior practice is. If a mistake is made in a pay check of any man in the Southern Pacific Company, if he is not credited with enough miles or enough hours, or if a watch is omitted, why, it is always

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*NOTE: Rather far fetched. The checks in question were not ordinary pay checks; they were in settlement—as the court found—of a dispute. Many of them were on account of work done several months before the check was tendered.

corrected. (*Note:* See Gorman's testimony, R. pp. 244, 260, 264.)

The Court. No matter what the endorsement is.

Mr. Booth. No matter what the endorsement is on the back of the check. But here is a special situation, and the check is issued in anticipation, as Mr. Hancock testifies to. Now we shall contend on the argument that that can not impair it to any extent by practice in the ordinary course of business. I think any public service corporation, or any other employer, would be, and justly, subject to very severe criticism if it relied on the endorsement of a check, no matter what the language was, if they attempted to preclude a man from opening the account and showing he had not been paid in full.

The Court. The language here referred to is written on the face of the check?

Mr. Booth. Yes.

Mr. Sharp. There is no language on the face of the check which purports to be in full settlement. The language on the face of the check is 'For additional compensation account'.

Mr. Booth. It says 'For additional compensation on account of this award'. 'For additional compensation account of Arbitration Award between Southern Pacific Company and Ferryboatmen's Union, October 31, 1927, from March to August, 1928, inclusive.'

Mr. Sharp. That is the only new language used.

Mr. Booth. And on the back of the check was the endorsement 'This voucher is endorsed as an acknowledgment of receipt of payment in full of account as stated within'.

The Court. Now, Mr. Sharp, you are seeking to show by this witness what?

Mr. Sharp. I am seeking to show by this witness that as a matter of fact, for many years, regardless of that statement on the back of the check, that the check was in full of account, it has been the uniform practice to permit the men to come in and get adjustments afterwards.

The Court. As I understand it, that is already in evidence before the Court, and Mr. Booth stated that that is the fact.

Mr. Sharp. Then what is the objection to the question? I want to go on from that and show it has applied to not only a single case, but wholesale cases.

The Court. You want to show it applies particularly to this check?

Mr. Sharp. I want to show also with respect to these particular checks, that no objection was made at that time because upon legal advice, in view of this past practice, *I informed them* to go ahead and cash the checks. I want to bring that evidence before the Court.

Mr. Booth. We object to it as incompetent, irrelevant and immaterial and not communicated to the defendants.

The Court. Sustained.

Mr. Sharp. Exception." (This is not one of the assignments of error—R. p. 323.)

The appellants refer to no authority for their position that the "practice" of the company with reference to claims made for rectification of *errors* in pay checks due to failure to credit an employe with enough hours, or mileage, or days, etc., had a bearing on the

cashing of special forms of pay checks in the circumstances of the instant case.

If the action is, as counsel assert, an action on a judgment or decree as upon a liquidated or quasi-liquidated demand, then of course past practice with respect to ordinary pay checks could have no possible significance.

If on the other hand, and as we claim, the suits, while formally in equity are essentially actions at law by an assignee to recover unpaid wages earned by its assignors under the terms of a written contract as amended by an arbitration award, several reasons exist that preclude the consideration of anterior practice, even if appellants' evidence be given the fullest weight.

First. There is no evidence that any past practice ever related to checks concerning the amount or basis of which there was a dispute or discussion, as here, *before* the check was issued. Adjustments were made, notwithstanding the release form on the back of a payroll voucher-check, where a mere error in credit or in computation had been made in the carriers' offices which became apparent when attention was called to it. (Gorman, R. pp. 244, 260, 264.) There is no evidence of any such practice in a case where, as here, there was a wide and fundamental difference of opinion between the parties as to the correct basis for the computation of amounts payable by a large number of checks.

Second. The action is by an assignee. No assignor appeared to testify that in cashing these checks

he relied on the alleged prior practice. If the oral replication to our pleas of accord and satisfaction and release is based on the theory of estoppel *in pais* it is well settled that the party setting up such an estoppel should have *relied* upon the conduct of the other and been *induced* by it to refrain from acting (*Ketchum v. Duncan,* 96 U. S. 659; *Thompson v. Bank,* 150 U. S. 231-244). Says the Court in the *Ketchum* case, supra (p. 668): "An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury and he only can set it up." No exception was taken to the refusal of the trial Court to permit Mr. Deal (R. pp. 279-280) —after he stated that many of the men took up with him "the question of cashing the checks" and that he "told them to cash them"—to testify that he told them he was doing so on counsel's advice and what that advice was. But even if he had so testified there was no offer to show that his position or his counsel's position was communicated to the carrier or that it had any reason to believe that past practice with regard to mistakes in ordinary pay checks was relied on or about to be relied on in cashing checks that bore on their faces a statement that they were for a definite *and unusual* purpose.

Third. We argued to the trial Court, and repeat that argument here, that the situation set up by counsel is closely analogous to waiver of the statute of limitations. Such a waiver, as to a particular character of transactions, might be a general policy of a business institution and known to all of its customers,

yet it would be entirely optional with the management to plead the statute in a given case, particularly one in which there had been a dispute existing as to what was due and a check was given and cashed.

Fourth. In each case prior to the issuance of the checks in question the carrier, by disregarding the "in full" endorsement merely waived it as to that particular check, feeling that insistence thereon, *in the circumstances of the particular case,* would be inconsistent with fair treatment of the employe. Reputable business men use endorsements of this character as a shield—not as a sword. It is not shown that in any of those cases there was any dispute as to the proper contractual basis for the check. The final adjustment checks in the cases at bar were the result of a strenuously contested adversary proceeding in which the parties dealt at arms length and felt it necessary to be represented by counsel at all stages of the controversy as well as to evidence their agreement by a written stipulation filed with the District Court, and which provided (R. p. 29, par. 4) that it should be incorporated in and *confirmed* by the final judgment. When Mr. Deal saw the checks they unmistakably showed on their faces the special account for which they were issued. He at once realized that they were for lesser sums than he had claimed to Mr. Hancock should be paid, but he did not go to the carriers and protest or ask whether they intended to treat the checks and their endorsements as ordinary pay checks and keep open the question of sufficiency of amount. He told the men to cash the checks, having previously discussed

the matter with the Union's attorneys. His attorney's advice was not communicated to the carriers. The Union's first protest was by its attorney's letter nearly three months after the men endorsed and cashed the checks and retained the money. They might have returned the checks, or, if counsel's position be sound, cashed them and rescinded the endorsement. But such a rescission would have necessitated either a bona fide offer to restore the money or a restoration thereof. That is exactly what they did not desire to do. They chose to retain the money and rely on an uncommunicated mental reservation based on an inapplicable "practice". Either that was their attitude or the claim of reliance on past practice is, as we more than suspect, a mere afterthought. It was not suggested in the letters counsel for the Union wrote to the carriers in January, 1929, three months after the checks were cashed. Those letters threatened contempt proceedings on the theory of the carriers non-compliance with a judgment. (R. pp. 195-9.)

Fifth. Conduct or practice of the carriers antecedent to the giving and cashing of these checks cannot be relied on as a *waiver* of the right to insist that the receipt in full be given full weight. A waiver of a right must be of an existing right. For example—a statute of limitations may by agreement be extended or tolled but it cannot be waived until the bar has fallen. The right of the carrier to insist on the releases here considered did not, of course, arise until their execution and the cashing of the checks. No consideration existed for any prior or anticipating waiver;

no right existed which could be waived by a course of conduct, if, as we deny, conduct may constitute a waiver to become operative as to independent, and subsequent transactions unconnected with the transactions in which a waiver was actually made, even though there be a general similarity between the two sets of transactions.

The language of Mr. Justice Harrison in *San Bernardino Investment Co. v. Merrill,* 108 Cal. 490, on page 494, seems exactly in point. He there said:

> "*The term 'waiver' or 'to waive' implies the abandonment of a right which can be enforced, or of a privilege which can be exercised, and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence.* There can be no waiver of a right that has been lost. 'Waiver is a voluntary act, and implies an election by the party to dispense with some thing of value, or to forego some advantage which he might, at his option, have demanded or insisted upon' (per Cooley, J., in Warren v. Crane, 50 Mich. 301). Bouvier defines waiver as 'the relinquishment or refusal to accept of a right'. (See also Stewart v. Crosby, 50 Me. 134; Shaw v. Spencer, 100 Mass. 395, 97 Am. Dec. 107; 1 Am. Rep. 115; Dawson v. Shillock, 29 Minn. 191; Bishop on Contracts, sec. 792.)

The Federal cases on release.

As we have heretofore stated, defendants in all cases pleaded "accord and satisfaction" as well as "release". Even though this Court may entertain

a doubt as to whether there was, within the strict rules laid down by some cases, an accord and satisfaction, nevertheless there was a release and acquittance, as shown by the following decisions:

In *De Arnaud v. United States,* 151 U. S. 483, there was an appeal from a judgment of the Court of Claims for $1,000,000 in plaintiff's favor for services as a military expert. Prior to suit he had been paid various amounts, the last check reading: "For services and expenses as special agent of the government $2000.00. Received, Washington, January 21, 1862, from John Pitts, disbursing clerk for the War Department, two thousand dollars in full, for the above account". The Court said (p. 494):

> "In the absence of allegation and evidence that this receipt was given in ignorance of its purport or in circumstances constituting duress, it must be regarded as an acquittance in bar of any further demand."

Appellants' attempt to show that in the case of *St. Louis etc. Co. v. United States,* 268 U. S. 167, 176, the Court came to an exactly contrary conclusion and state that the decision explains there is a different rule in regard to government claims, and there was an accord and satisfaction based on a disputed claim. An examination of that case, however, shows that the Court merely held that under the facts it was not an accord and satisfaction; that payment of a liquidated debt was not sufficient consideration for release by creditor of *other* unliquidated claims. The only reference to the *De Arnaud* case is in the footnote, page

176, where it is stated: *"There was a receipt in full or a release"*. (Italics ours.)

The case of *Chicago-Milwaukee Ry. v. Clark,* 178 U. S. 353, 368, 369, was an action upon a contract. Clark accepted a writing executed and delivered to him, acknowledging the receipt of a certain sum of money "in full satisfaction of the amount due me on such estimates and in full satisfaction of claims and demands of every kind etc. * * *". That action was filed five years and nearly five months after the receipt of the money and the execution and delivery of the discharge. The Court cited many cases from other jurisdictions, including that of *De Arnaud v. United States,* supra, and concluded:

> "Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud or mistake."

The instant suits were filed within two days of five years after the judgment affirming the award was rendered. The final checks were paid within a week after the judgment was entered.

In

> *United States Bobbin & Shuttle Co. v. Thissell* C. C. A. 1st), 137 Fed. 1 (Cert. denied 199 U. S. 608),

it appears that a check was sent an employe with a letter stating that the check was in full payment of

balance of salary due and "unless you find above correct you will return our check and statement". A receipt was enclosed. The employe replied that he had deposited the checks and that when he had time and opportunity, he would examine the letters, and if found correct, they would receive proper attention. The Court said (p. 2):

> "The plaintiff did not sign the inclosed receipt, and his letter shows that he wished to keep the matter open. Notwithstanding this, we are of the opinion that his appropriation of the check, under the circumstances stated, was an acceptance of the terms upon which payment was offered. The weight of authority is to this effect."

Yazoo & Mississippi Valley R. R. v. Webb (C. C. A. 5th), 64 F. (2d) 902,

was a suit based on a contract between the railroad and the Brotherhood of Railway Trainmen. Webb, a negro, had worked for the railroad, first as a brakeman and afterwards as a train porter. He got judgment in the Court below on the theory that he was entitled to a flagman's pay, the District Court apparently disregarding the defense that each two weeks he had cashed paychecks expressed to be "In full for services rendered".

In reversing the judgment, the Circuit Court of Appeals in the concluding portion of its opinion (p. 905), upheld the defense based on the language of the paycheck, and said:

> "* * * One cannot keep money offered as in full settlement of a disputed claim and reject the condition on which it is offered."

In

Samuels v. Drew, 7 Fed. (2d) 764 (Affd. in 7 Fed. (2d) 766),

an employe was working for a receiver with no agreement as to the amount of his compensation. There was a dispute between the receiver and the employe as to the amount, and while the receiver told the employe that the payments were to be in full compensation, the employe never assented to the terms and "was constantly pressing for some modification of them". Nevertheless, he cashed his paychecks, which apparently bore no endorsement that they were in full of services. The Court says (p. 766):

> "When, therefore, he received his January check and all other checks, Conway had his option, being on his own written admission advised that it was to be in full compensation, either to turn it back and press for larger pay, or to take it and be satisfied."

In *Schwartzenburg v. Mayerson* (C. C. A. 6) 2 Fed. (2d) 327, a check was sent by the purchaser of a consignment of fish, to the seller, with the endorsement "in full to date". The seller wrote the purchaser that it would not accept the check upon those terms, but the Court said (p. 328):

> "nevertheless it did accept the same with this indorsement thereon, and deposited it in the bank to its credit before it received any reply from the defendant to its letter rejecting the check in full payment. Under the admitted facts and circumstances of this case, we do not think the plaintiff can now be heard to say that the check

> was not accepted by it in full satisfaction of all claims against the defendant, accruing prior to that date."

Further State Court cases.

In *Tanner v. Merrill,* 108 Mich. 58, plaintiff sought to recover a sum which had been deducted from his wages by defendants, his employers. The amount of his wages was not disputed, but the right to make any deduction was questioned. Plaintiff received the amount of his wages less the deduction, and gave a receipt in full, and afterwards brought suit to recover the balance on the ground that, having only received the amount admitted to be due, there was no consideration for the release as to that which was disputed. The Supreme Court of Michigan held that the plaintiff could not recover, and that the rule that a receipt of part payment to be effective in the discharge of the entire debt must be rested upon a valid consideration, is limited to cases where the debt is liquidated by agreement or otherwise; that a claim any portion of which is in dispute cannot be considered to be liquidated within the meaning of the rule; and that a receipt in full, given upon payment of the undisputed part of the claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress or undue influence.

In *Hamilton & Company et al. v. Stewart,* 105 Ga. 300, 302, the Court said:

> "The retention of the amount forwarded, declared to be in full settlement of the claim held

by the person to whom it is sent, coupled with a failure within a reasonable time to decline the proposition, will raise a conclusive presumption of an acceptance of the terms and conditions set forth in the proposal. * * *

Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon a condition stated, the party receiving it can not retain the property and repudiate the condition."

In *Jenkins v. National Mutual B. & L. Asso.*, 111 Ga. 732, 734, it was held:

> "that where a debtor remitted to a creditor less than the amount of the debt as claimed by the creditor, upon the distinct understanding that the same was to be received in full discharge of the debt, if the creditor did not, within a reasonable time after the money was received, repudiate the offer and return the money remitted to him, all liability on the debt would be discharged."

In *Johnson v. Burnett*, 17 Cal. App. 497, 501, the Court said:

> "Where tender is made to a party to whom a debt is owing of an amount less than that which is claimed to be due, and the amount claimed to be due is unliquidated, and the party making the tender in express terms offers the payment as in full satisfaction of the disputed account, the offeree in that case is bound, either to reject the offer, or to accept it upon the precise terms denoted by the tender. (*Creighton v. Gregory*, 142 Cal. 34 (75 Pac. 569); *Weller v. Stevens*, 12 Cal. App. 779 (108 Pac. 532).) If he appropriates to

his own use the amount tendered, he cannot afterward be heard to say that he did so upon any terms other than those to which the person making the offer imposed upon him. Such a state of facts is that precisely illustrated by the evidence in this case. It was said in *Nassoiy v. Tomlinson,* 148 N. Y. 326 (51 Am. St. Rep. 695, 42 N. E. 715), where a similar case was considered: 'The plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered "in full", was not, when accepted, a payment in full. * * * He was bound either to reject the check or by accepting it accede to the defendant's terms. * * * He could not accept the benefit, and reject the condition. * * * The use of the check was *ipso* facto an acceptance of the condition.' "

Appellants have cited no cases that announce any different rule than that stated in the above. They rely on the case of *Sierra etc. v. Universal etc. Co.,* 197 Cal. 376, but therein the Court said:

"Upon receipt of the bill covering power delivered for the month of August, 1918, the defendant refigured the same applying the nine-tenths factor which made a reduction for the month of $420.12. A new bill with voucher attached, based on the refigured amount, was prepared by the defendant and transmitted to the plaintiff together with a check for the smaller amount. The wording of the voucher was as follows: 'Received of Universal Electric & Gas Co. in full payment of above account six thousand eight hundred twenty-six & 42/100ths dollars'. The plaintiff refused to sign the voucher but wrote the defendant as follows: 'We enclose herewith a receipt for $6,826.42, the amount of your check on account of August, 1918, power

bill, $7,246.54. Because of the deduction which you have made from our bill we are obliged to furnish you with a receipt on account. We have accepted the check under protest and have passed the same to your credit.' The following is the form of the receipt: 'Received of Universal Electric & Gas Co. six thousand eight hundred twenty-six and 42/100ths dollars to apply on account of August, 1918, power bill. Unpaid balance, $420.12.' The same procedure was followed by both parties each month thereafter to and including February, 1919. From March to June, 1919, the defendant continued to send the vouchers to the plaintiff with checks for the smaller amount. As to these vouchers, the plaintiff signed and returned them, first crossing out the words 'in full payment of above account' and inserting the words 'on account' of the bill for the particular month. Beginning July, 1919, and ending December, 1919, when the service was apparently discontinued by mutual consent, the defendant on receipt of each monthly statement for that period made out a bill for the smaller amount and submitted it with a voucher check on the back of which was the following: 'If not correct return without alterations and state differences. Make all indorsements below. This check is hereby accepted by the payee in full payment of the within account and indorsed as follows.' These checks were indorsed by the plaintiff without change or alteration. In addition to the foregoing procedure it appears that early in the period covered by this controversy the parties referred the matter to their respective attorneys and payments were thereafter made by the defendant through its attorney with an accompanying letter beginning December 9, 1918, as follows: 'This

check represents the amount admitted to be due by the Universal Company on account of the items for electrical energy furnished and charged in your bill in the month of October, 1918. The check does not include two items mentioned in that account, viz.: the surcharge of one and one-half mills per K. W. H. and in addition deducts 1/10th of the maximum demand change charge * * * It was the expectation of the Universal Company and of myself that before tendering the enclosed check it would take up with your attorney * * * the items in question as to which payment is not made * * * and if agreeable to you, this procedure will be adopted. I am in hopes of obviating the necessity of resorting to the arbitration provisions of 1915 contract * * *'' The checks for the remaining months of the period were transmitted through the defendant's attorney and were accompanied by his letters identical in form as follows: 'Herewith please find Universal Gas & Electric Co.'s check * * * being the amount admitted to be due on your bill * * * The check is similar to that sent you with my letter of December 9, 1918, covering October bill, the same deductions being made from your statements as rendered and the same reservations and conditions being present as regards the items withheld * * * As on previous occasions you will undoubtedly not be in a position to sign the full payment voucher accompanying the check, but if you will attach a receipt and return the same with the voucher, pending final adjustment, this will be appreciated'."

Moreover, the Sierra Company was a public utility and the Court says (p. 387) that "the statute ex-

pressly forbade the plaintiff to charge or receive compensation for electric energy at any rate other than that specified in the contract duly filed. It therefore could not lawfully accept the amounts tendered by the defendant".

In *Berger v. Lane,* supra, 190 Cal. 443 (a nonsuit), the check was not endorsed in full payment. The same was true in the *Lapp-Gifford* case, supra, 166 Cal. 25, as well as the case of *Messer v. Tait's Inc.,* 121 Cal. App. 698, 701. In the case of *Carpenter v. Markham,* 172 Cal. 112, 115, cited on page 55, accord and satisfaction was not pleaded. No check was involved but a receipt was given in connection with a bond. The Court held that the receipt could be explained and therefore was not a receipt in full. In *Hansen v. Fresno Jersey Farm etc. Co.,* 74 Cal. App. pp. 291-293, the action was on an account stated. Checks were not endorsed as payment of account in full, and accord and satisfaction was not pleaded. Appellants seem to place great reliance on the case of *Whepley Oil Co. v. Associated Oil Co.,* 6 Cal. (2d) 94, since they cite it in several places but an examination of that case shows that the plaintiff instituted an action for the purpose of recovering from defendant a specified sum claimed to be due as royalty on casing head gasoline. Provisions of the agreement of lease formed the basis for plaintiff's claim that defendant was legally obligated to pay the amount for whose recovery the suit was brought. It does not appear from the decision whether the accord and satisfaction was specially pleaded. It was further stated that the evidence showed the appellant

acquiesced in the proposal for arbitration of the controversy; it further appeared that the checks which were endorsed in full for the royalty payments were deposited in a bank as agents for the lessors (plaintiffs). *The Court found the bank was empowered to do no more than to receive and acknowledge the payments.*

Appellants place emphasis upon those portions of several California decisions which hold to the effect that the tender must be accompanied by "acts or declarations that it amounts to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim and the creditor so understands it", and at page 62 of their brief the words "and the creditor so understands it", is doubly emphasized. That language is quoted from *Berger v. Lane,* supra (190 Cal. 443), which case as we have pointed out was a case of nonsuit and the check was *not* endorsed "in full payment". But, as the Court said in the remainder of the quotation at the bottom of page 62 of appellees' brief "its acceptance even though the creditor states at the time that the amount tendered is not accepted in full satisfaction, *constitutes an accord and satisfaction*". (Emphasis ours.) This decision is in harmony with the decisions from other jurisdictions cited by us. So it seems clear thereunder that the acceptance and cashing of the checks endorsed in full payment and retention of the money was sufficient consideration for an accord and satisfaction.

Under the many cases cited by us, we believe that there was accord and satisfaction, and also that the

cashing of the special checks and retention of the money was a release and acquittance. The Federal decisions we have cited are quite controlling on both points.

An Accord and Satisfaction can be had of an amount due on a Judgment. The Union was not a Judgment Creditor.

Appellants argue that the amounts sued for were due on a judgment. They treat that judgment as a liquidated demand; that position is obviously untenable, but whether liquidated or unliquidated they insist that the Union was the judgment creditor, although assignments were taken from individual 12-24 hour men; first, to the members of the unincorporated union collectively, and then by the unincorporated association (union) to the incorporated association. (Para. II, Complaint, R. p. 121; Finding VI, R. p. 126.)

That the Union is in no sense a judgment creditor, but throughout the arbitration and impeachment proceedings and up to the entry of judgment acted merely as an agent or representative with no proprietary interest in increased pay or back-pay, we believe we have demonstrated in the preceding chapter VI.

Treating, then, the demands of the 12-24 hour men for back pay as arising upon or, if one pleases, as merged into, the final judgment and evidenced thereby, it is clear that they, nevertheless, each 12-24 hour man who had not been paid in accordance with the retroactive application of the terms of the award, and not the Union was a judgment creditor.

The final judgment (R. pp. 23-24) provides (R. p. 30) that the carriers "shall pay the *employes* the following wages" (increased monthly pay); that they shall "put in effect" (R. p. 31) the amended watch Rule 6; that (R. p. 33) they "shall pay all overtime due or to become due" under Rule 8; and, finally (R. p. 34), that they shall "cause *all of said employes to be paid* all back pay retroactively or otherwise due *to said employes* or any of them in accordance with said award or this judgment". Thus if the judgment be treated as a judgment for money, it was, whether liquidated or unliquidated in amount clearly in favor of the individual employes as their interests might appear and not in favor of their representative the *Union*. If the carriers' obligation to pay back pay solely arose from or was based on the judgment the trial Court was clearly correct in concluding Finding XVIII by stating (R. p. 136): "The judgment was not one for which the Union could enter satisfaction of record as the individual employes were the actual judgment creditors of the company."

The authorities are conclusive to the effect that such a demand even though based solely on a judgment is susceptible of an accord and satisfaction for a lesser amount than that which the judgment, properly construed and applied, would give the judgment creditor. While cases in State Courts—none in California—may be found to the contrary, the Federal decisions are conclusive on the point.

As early as 1851 it was so held in *Farmers Bank v. Groves*, 53 U. S. 51 on page 58, s. c. 13 L. ed. 889.

Then came *Boffinger v. Tuyes* (1887), 120 U. S. 198—bot. p. 205, 30 L. ed. 649. To the same effect is *In re Freeman,* 117 Fed. 680 on page 684. The *Boffinger* case, supra, so far as we can ascertain from Rose's Notes and Shepard's Citations has never been modified or criticized.

We respectfully submit that the 12-24 hour men as individuals had full power to settle, compromise, settle and release their claims under the judgment up to the moment they parted with that right by assignment to the Union, which took title and now sues as an assignee and not as an original judgment creditor.

VIII.

COSTS.

The appellants seek to escape costs, conceding that if the proceedings are in equity costs are discretionary.

It is not true that the carriers have violated any "agreement to abolish 12 hour watches upon the rendition of the award"; nor is it true that they have "wilfully refused to carry out the award, although in writing they agreed to put it into effect immediately".

The carriers felt aggrieved and injured, believing that the Board had unlawfully refused to consider evidence the carriers offered on the subject of exceptions to Rule 6. There was an agreement to arbitrate but no agreement not to petition on statutory grounds

to impeach the award; nor did the carriers agree not to appeal to this Court. They exercised that legal right and should not be penalized for doing so.

The Union and its Secretary-Manager waited five years—lacking two days—to come into the Federal Court, and when they did so proceeded on a theory that in itself violates the spirit and text of the award as well as the very principle for which the Union contended—equalization of hourly rates. Having pursued the appellees for five years with unjust assigned claims taken on a contingent basis and used both State and Federal Courts as experimental procedural laboratories, they now ask to be relieved from the proper consequences of their own persistence. If this were an ordinary suit in equity the Court would not hesitate to impose costs on the losing party. We respectfully submit that counsel suggest no reason for the Court to deviate from the usual and ordinary practice.

CONCLUSION.

It is not true, as stated by appellants in their "Conclusion" on page 78, that the carriers pledged in writing that they would abolish the 12 hour watches immediately upon the decision of the Board of Arbitration. There was no undertaking on their part that they would not avail themselves of the statutory right of review of that decision on the grounds afforded by Section 9 of the act.

It is not true, as stated, that the rules of the company, the past practice or the judgment of the Court

required overtime "for all hours in excess of eight hours that should have been worked"; to the contrary overtime in excess of 8 hours only applied to regularly assigned watches of 8 hours, which on a monthly basis were 26 or 27 hours per watch and which were required by the rules to be worked six consecutive days, except on "broken assignments".

It is not true that the carriers "*admittedly* did not pay that overtime". By the final adjustment the carriers paid an amount equal to the daily pay of an 8-16 hour man for the first 8 hours of each 12 hour watch actually worked and paid the same hourly pay as the 8 and 16 hour men for each of the remaining 4 hours of each of their 12 hour watches. That is specifically found by the Court and, as we have shown, is amply sustained by the evidence.

It is not true that there "was a specific understanding as to these pay checks that they might be corrected afterward". There is not a syllable of evidence in the record—even from plaintiffs' witness Deal—that there was any such understanding *as to these checks* and the conclusion is an exceedingly careless misstatement not supported by the evidence.

There were no "ingenious mathematical formulae used in making the final adjustment". The Hancock formula was simple, fair and entirely adequate and produced the exact effect found by the Court—that of fully compensating the 12-24 hour men on the same basis of pay per day and per hour as the 8-16 hour men received during the same period, and that these men were paid at the 8-16 hourly rate for each additional hour over 8 hours.

The defenses of accord and satisfaction and of release were properly pleaded, fully proven and amply sustained by the law on those subjects.

The findings of the trial Court are fully supported by the evidence and its conclusions of law are legally correct.

Therefore, the several orders and decrees appealed from should be affirmed.

Dated, San Francisco,
May 8, 1936.

Respectfully submitted,
HENLEY C. BOOTH,
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Attorneys for Appellees.

No. 8117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Ferryboatmen's Union of California (an unincorporated association), Ferryboatmen's Union of California (a nonprofit corporation), and C. W. Deal,
Appellants,

vs.

Northwestern Pacific Railroad Company, Southern Pacific Company and The Western Pacific Railroad Company,
Appellees.

Ferryboatmen's Union of California (a nonprofit corporation), and C. W. Deal,
Appellants,

vs.

Southern Pacific Company,
Appellee.

Ferryboatmen's Union of California (a nonprofit corporation), and C. W. Deal,
Appellants,

vs.

Northwestern Pacific Railroad Company,
Appellee.

APPELLANTS' REPLY BRIEF.

FILED

MAY 14 1936

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No. 8117

IN THE

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For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

APPELLANTS' REPLY BRIEF.

As the brief for appellees raises new matter (including an issue not covered by the pleadings or findings) and as certain other matters require comment, we feel that the

importance of this case justifies a short reply brief on behalf of appellants which we trust will aid the court in coming to its conclusions.

On the main point in the case we showed in our opening brief that plaintiffs rely on a judgment abolishing 12-hour watches as of a retroactive date, and hence entitling them to overtime for the last 4 hours of each 12-hour watch.

The judgment and the award in this regard are plain and explicit. The carriers in reply do not even pretend to have complied with the plain provisions of the judgment, but defend the "adjustment" made by them by argument irrelevant to the question as to whether or not they carried out the judgment. We shall discuss each point in this brief seriatim and show how plainly appears the utter failure to observe the requirements of the judgment.

I.

There Was No Conflict of Testimony.

The carriers open their discussion by quoting a number of findings most of which pertain to matters not in dispute. They justify this by claiming our statement of the facts to be 'inaccurate" and claiming particularly that there was "sharp conflict" in the testimony as to certain respects which they promise to "designate". We fail to find any such designation and can find no instance of conflict of testimony.

True, the carriers claim their method of adjustment is proper, but, what the carriers actually did, is not in dispute, although there is dispute as to whether or not what

they did complies with the judgment. Disputes as to legal effect can not change our statement there was no conflict at all as to the facts involved.

Throughout their brief carriers declare that the court made certain decisions and findings and in effect held the method attempted by the carriers to be a correct one. In this connection it should be pointed out that most of the findings were as to matters regarding which there was no dispute between the parties.

As to the merits of the case, the court takes the most unusual course of merely stating the contentions of both parties and then without analysis or argument or discussion proceeds to state that upon consideration of all of the facts and circumstances it is inclined to be of the opinion that the compensation was fairly made. The fact that the judge believed that the extra compensation was fairly made does not answer the problem. The question was whether or not the employees received all they were legally entitled to under the judgment. The court's opinion that they received a fair amount does not answer the question. The court does not attempt to show that the method attempted by the carrier was proper nor did the court in its opinion indicate wherein the contention of the employees was legally unsound.

In fairness to the trial court, however, it should be stated that no briefs were filed. The case was orally argued and the oral argument written up, but we feel confident had the matter been presented in briefs to the trial court, it would have come to a different conclusion.

II.

The Issue on the Merits is: Did the Carriers Pay the Wages Required by the Judgment? It is No Answer to Say that to do so Would Give the Men "Additional Pay" or an 18% Higher Rate. The Differential in Fact Was Caused by the Carriers Failing to Observe the Award.

The judgment required the 12-hour watches to be abolished as of March 1, 1928 (R. p. 31). In fact it is admitted the 12-hour watches continued for six months thereafter, that is, March to August, 1928 (R. p. 57) and this is the period in controversy.

As will be remembered from our opening brief (p. 17) the carriers originally agreed to put this part of the award into effect immediately after its rendition, that is "the first day of the month following the date on which the award is filed" (R. p. 86).

When the carriers signed this agreement they knew that any appeal to the courts would take more than a month and obviously made this agreement to settle what rule should be in force pending any appeal.

Notwithstanding this agreement, they refused to assign the 12-hour men to 8-hour watches, but assigned them to the same previous 12-hour watches, which, as already seen (appellants' opening brief p. 27) meant an assignment of 20-21 watches a month instead of the normal 26-27 watches per month, but meant a good many more hours per month.

But the men worked all the assignments made by the company (R. pp. 249, 277, 280), and if the company chose to gamble that they could reverse the award, in spite of their written agreement which in effect obliged them to

observe the award pending an appeal, they cannot now complain that their failure to make normal assignments caused the men to receive a monthly salary for less assignments than they could have been asked to work.

The Carriers' Argument Depends Upon the Theory that the Appeal "Suspended" the Award and Wiped Out the Agreement to Observe the Award Immediately.

The carriers declare that they were justified in ignoring the award during the six months in controversy, because (Carriers' brief p. 33):

> "During that six months the award was suspended."

This contention is the heart of the carriers' case and all of their arguments are based on it. The contention in various forms is repeated throughout the brief and once the fallacy of this point is seen, the weakness of the position of the carriers becomes manifest.

The carriers argue that the award was "suspended" and that therefore it was legal to assign the men to 12-hour watches.

If the award could be said to be in "suspense" pending an appeal to the courts, such suspense would merely mean that during such period the carriers could not be compelled by legal machinery to put the award into effect, although their agreement required them so to do. Upon the expiration of the period of suspense, the carrier would then have to put the award into effect *retroactively* as of March 1, 1928, covering the period of suspense as the judgment so provides. The carriers, however, in their brief take the position that the alleged period of suspense

gave them not only the right to disregard the award during such suspense but also that even after the suspense ended, they were not required to comply with the award retroactively for the suspense period but only from and after the expiration of the suspense period. This theory is not merely contrary to the judgment, stipulation of the parties, arbitration agreement, but also to the carriers' own conduct. For the carriers have always contended that under the Hancock formula they did comply with the award retroactively for the suspense period.

But if the award was suspended, why did the carriers make any adjustment at all! If 12-hour watches were legal, then the former 12-hour rate was legal too, and there was no necessity to raise the 12-hour men to the hourly rate of the 8-hour men.

The carriers argue that to give the abolition of 12-hour watches a retroactive effect it is sufficient to give the men the higher rate of the 8-hour men.

But the rate of pay is only part of the award; the length of the watches is a more important part. The carriers have no right to say that part of the award is suspended and part is not. There is no justification for giving part of the award (the rate part) effect and at the same time ignoring the part which fixes the length of the watch.

At page 42 the carriers repeat the contention that the award was "in suspense". They then admit (p. 43) that under Rule 8 the monthly salary covered "the present recognized straight time assignment" but go on to say (p. 44) that the 12-hour men "were not, in any sense" 8-hour men.

This statement is true only if the award was "in suspense". But the judgment requires the award to be effective and hence all men must be treated as if they were 8-hour men and hence the last 4 hours of each 12-hour watch is overtime.

The carriers ask (p. 43) "why should the company pay the 12-24 hour men a month's pay for 20 or 21 eight hour watches?"

The answer is: Rule 8 gives the men a monthly salary for straight time assignments. The company could have assigned more watches for the same monthly salary but preferred to gamble on a reversal in which case it would have gotten the last 4 hours of each 12-hour watch without additional pay, and would have gotten more hours per month for the same salary (as 12-hour watches aggregate to a larger total although there are less watches per month than if 8-hour watches are assigned).

They lost the gamble and are trying to make the men bear the brunt of it.

There is No Justification For Treating Any Part of the Award "as Suspended". The Judgment Expressly Requires the Carriers to Give Retroactive Effect to the Rule Abolishing 12-Hour Watches.

The judgment dated September 29, 1928, declares (R. p. 31):

> "The rule pertaining to hours of service (and in said Award denominated as Rule 6) as re-written in said Award shall become **effective as and from March 1, 1928,** * * * reading as follows:

'Hours of Service.

Rule 6.

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.' "

The judgment declares that the carriers (R. p. 33)

"shall pay all overtime due or to become due in accordance with said Rule 8, said rule reading as follows:

'Overtime.

Rule 8.

The monthly salary * * * shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the prorate rate.' "

The judgment goes on to require the carriers (R. p. 34) to

"make such orders and issue such instructions as will **put such wages and rules into effect as of the effective dates above mentioned** * * * and as will cause all of said employees to be paid all back pay retroactively or otherwise due to said employes or any of them."

In the face of the plain language of the judgment declaring that Rule 8 to have been in force as of March 1, 1928, how can the carriers argue that the award was "suspended" during the six months' period commencing on that date.

Any Failure to Work "Six Consecutive Days" or 26-27 Watches is Due Entirely to the Refusal of the Carriers to Make Such Assignments. The Men Worked Every Assignment Made by the Company.

The carriers say (p. 33) the men worked 12-hour watches because court proceedings were pending. That is not correct. They worked 12-hour watches because the company in violation of the arbitration agreement (R. p. 86) required 12-hour assignments, and the men had to accept the action of the carriers or quit work (R. p. 288).

12-hour men were assigned less watches per month than 8-hour men. Were it not for the award, this would have been proper, and the last 4 hours of each watch would not be overtime.

But, having chosen to gamble on reversing the judgment, the carriers made less assignments than they were entitled to make under the award. They did this in an attempt to avoid paying overtime for the last 4 hours of each 12-hour watch and to get the larger aggregate of hours involved in 12-hour assignments; 8-hour men aggregated 208 or 216 hours per month (8 times 26 or 27 watches) while 12-hour men aggregated 240 or 252 hours per month (12 times 20 or 21 watches).

Hence, since both groups of men got the same monthly salary, the hourly rate of the 12-hour men is declared by the carriers to be 18% higher if paid as called for by the court. But this is due entirely to the failure of the carriers to work the men full assignments on 8-hour basis.

The 18% is obtained by ignoring the fact that the company failed to assign the men all the normal 8-hour assignments.

The men do not get any higher rate, unless such hourage is eliminated. But, if the rate is higher, it is the fault of the carriers who could have had the additional watches by making the additional assignments, and thereby avoiding overtime. The overtime is what causes the alleged 18% differential. Under the monthly salary the men could and should have been asked to work 26-27 watches of 8 hours. Instead, the company assigned 20-21 watches per month (of 12 hours each). But the company made the assignments, not the men (see discussion and citation to the record at p. 27 of our opening brief).

The overtime arose out of the fact that the carrier assigned the men to 12-hour watches. But for the award the 12-hour watches would have been legal. The award in abolishing the watches made the last 4 hours overtime. The carriers insisted on making assignments which under the award constituted overtime.

Of course adding overtime to the monthly salary gives the men additional pay. Prorating this additional pay over the hours worked is the method by which the carriers arrive at their 18% differential.

But there is no differential in fact. One group was assigned overtime hours and the other group was not.

Again the fallacy of the carriers' position lies in failing to recognize that after March 1, 1928, 12-hour watches were improper and were not "in suspense".

Repeatedly throughout the brief the carriers complain that the 12-hour men are not entitled to regular pay plus overtime on the 8-16 hour basis because they did not work "six consecutive days". It must be remembered however

that the rule providing for the monthly salary declares that it should be for "the present recognized straight time assignment". It is without dispute that it was the company and not the men which made the assignments during the period in controversy (R. p. 249). It was the company that chose to make the assignments in the particular way complained of (R. p. 277). If the carriers wanted to make the objection that the men did not work the full assignments—26 to 27 watches, or six consecutive days—they could and should have made such assignments.

The carriers cannot by failure to make the proper assignments complain that the men did not work additional watches to which the company did not see fit to assign them. It was the company that insisted on the particular assignments which the men worked, and as said by the representative of the men (R. p. 288), "It is not our fault * * * if you did not see fit to assign the men * * * you assigned them so many watches per month for which they paid the monthly wage * * * The company assigned the watches. The men either had to work on them, or not work".

If the contention of the carrier in this respect is sound, they can in any situation ignore the award by failing to make the proper assignments and then blame the men for working only the assignments which the company made.

The Arbitration Agreement Required the Carriers to Observe the Award While the Case Was Pending on Appeal. Had the Carriers Observed Their Agreement the Present Difficulties Could Not Have Arisen.

The carriers claim that they had to ignore the award in order to preserve their rights on appeal. But this argument is not justified by the facts.

When they signed the agreement to make the award effective immediately (i. e., at the end of the month, R. p. 86) they knew that either side could appeal to the courts. They knew this because the agreement provided that the award should be filed in the district court (R. p. 86). The agreement was made and proceedings had pursuant to the Railway Labor Act, as the carriers admit (R. p. 43). That act provides for hearings before the district court and an appeal to this court (45 U. S. C. §159). Obviously these court proceedings and appeal would require more than a month.

Hence when the carriers agreed to make the award effective on "the first day of the month following the date on which the award was filed" (R. p. 86) they knew it would take months to determine any appeal to the courts. Therefore they cannot argue that the award was "suspended" in the face of a plain agreement to make it "effective" at once.

The carriers argue they had a right to appeal. Certainly they had a right to appeal. But, pending any appeal some rule had to be observed in practice, either the rule contended for by the men, or the rule desired by the carriers.

The arbitration agreement decided that question by requiring to be observed whatever rule was set out in the award.

Had the rule been in favor of the carriers, they certainly would have claimed the right to follow the award pending any appeal by the men.

III.

The "Hancock Formula" is Not Justified by the Judgment or the Award.

Under this heading the carriers repeat their contention that by appealing to the courts, the award was suspended. Only this time they state (p. 45) that the court proceedings "resulted in a preservation of the status quo". The fallacy of this argument and its inconsistency with the written agreement of the carriers and the provisions of the judgment, has just been discussed by us.

At page 46 the carriers repeat the contentions that during the period in controversy "they were working under the, as yet, unmodified contract which in section 6 specifically provided for 12-24 hour assigned watches".

If this be true, what of the agreement to observe the award immediately, what of the judgment abolishing 12-hour watches?

The carriers admit that all the "Hancock formula" did was to equalize "the hourly and daily rate" of wages. But more than equality of rate is involved. The equality of length of watches is just as important an element. Making one man work a checkerboard of 12 hour watches

is not the same as regular 8-hour watches even though the hourly rate be the same.

It is true, as said by the carriers (p. 49) "one of the objects of the arbitration was to equalize the hourly pay of the two classes". If that were the only reason, it would have been a simple matter to retain 12-hour watches and raise the hourly rate to an "equalized" basis. The fact is, however, that the only way the men could be "equalized" was to give them all the same watches. In fact the men claimed that the main reason for the arbitration was the abolition of the 12-hour watch system (R. p. 279). The award did abolish such watches.

IV.

The Claim of So-called "Misstatements" is Based Entirely on Our Refusal to Accept the Carriers' Contention that the Award Was "Suspended" When the Carriers Chose to Ignore Their Written Agreement to Observe it.

When we read the opening part of the carriers' brief we were amazed that our good friends saw fit to charge that our statement of the case was "in important respects, inaccurate" (p. 2). Counsel went so far as to charge that we erred in stating there was no conflict of testimony. Counsel were so bold as to state that "there was sharp conflict in the testimony in a number of respects *we shall designate*".

We have read the brief carefully but evidently counsel could discover nothing to "designate" as we find no conflict of testimony referred to anywhere in the brief, for the carriers. Of course there is plenty of conflict of opinion between counsel but not of testimony.

Therefore, we repeat the statement questioned in our brief (p. 5):

> "On the merits of the controversy, there was no conflict of testimony. There is no real dispute as to the hours worked by the men or the amounts paid them or the method pursued by the carriers in making the amounts paid."

We made this statement deliberately and feel in fairness the carriers should now admit that it was a correct statement.

At page 50 under heading IV the carriers declare our brief to be "pervaded by misstatements and misapplications of the rules".

Ordinarily we would pass by such statements as lawyers' poetic license or as the hyperbole which too often is invited by the heat of forensic display. However, we stop to challenge these remarks, not to justify ourselves by the record—our page references to the transcript do that—but because the so-called "misstatements" emphasize the fundamental misconception of the carriers' case, namely, that the carriers could by their own unilateral action "suspend" the award. Of course if the award was "suspended" many of our statements are incorrect because we are innocent enough to believe that where a judgment says something it means what it says until reversed or modified. We also assume that a written agreement that an award be "effective" at once means just that and not that either party can "suspend" it for reasons of his own.

The first "correction" illustrates what we mean. On pages 25 and 26 of our brief we quoted Rule 8 declaring

that the monthly salary covered "the present recognized straight time assignment" and excess hourage was overtime. We then argued that as the award abolished 12-hour watches, the only straight time here involved was for 8-hours. On page 26 we repeat and summarize our argument by stating that the men got a monthly salary for straight time, and overtime for hourage in excess.

On the basis of this statement of our position we are accused of misstating the record, being told that the men were not on 8-hour assignments but that (Carriers' brief p. 50)

> "they were on a 12-24 hour basis, which was a 'recognized straight time assignment' during those six months."

In other words, the carriers insist that the award was "suspended" during those six months and hence 12-hour watches were effective. But, as already seen, we are dealing with a judgment calling for 8-hour watches retroactively and it begs the question to assume that 12-hour watches were proper notwithstanding.

This is typical of the "misstatements" charged against us. We submit that our good friends should have used other language in characterizing our refusal to agree to their theory that unilateral action could suspend the written agreement to observe the award immediately and our refusal to agree that where a judgment says 12-hour watches shall be abolished as of a certain date that notwithstanding such watches are legal and proper.

The next "correction" is to the same effect (Carriers' brief pp. 50-51). They refer to our quotation by Hancock himself that hourage in excess of assigned 8-hour watches

is overtime by declaring regular assigned hours were "twelve hours—not eight hours". This again begs the question. It represents a difference of opinion, but certainly does not justify an accusation of misstating the record.

Other "corrections" are made in the same vein until finally the basis for this is stated in so many words. Say the carriers in their brief (p. 54):

> "During the six months in suit the award was in suspense; the old Rule 6 remained in effect * * * and 12-24 hour watches were entirely proper."

We have gone into the alleged "misstatements" not to show we properly stated the record, but to emphasize the fallacious theory underlying the carriers' whole case; that even though the judgment abolished 12-hour watches for the period in question yet they "were entirely proper".

If so, that is the end of our case, and the carriers should not have paid us even the checks they did give us. But the judgment says as of March 1, 1928, there were only 8-hour watches and if so, 12-hour watches could not have been "entirely proper" and the men are entitled to overtime for the last 4 hours of each 12-hour watch.

V.

Laches Was Not Pleaded by the Carriers and the Defense is Neither Available Here Nor Justified by the Facts.

The carriers have a two page heading on the subject of laches. But this defense was not pleaded, no issue was raised on it and the facts referred to by carriers show that it is not a proper element in this case.

Had the issue been raised we would have shown the energetic steps that were taken in the state courts which have come to naught because the Superior Court erroneously accepted the carriers argument that the state courts had no jurisdiction. We were dealing with a situation without precedent, made difficult by the carriers repudiation of their written agreement to make the award effective immediately.

The carriers have shown no injury by our availing ourselves of the full period allowed by the statute of limitations. They have the money we claim is due the men for wages.

We did not offer to restore any moneys received as the carriers now admit and always have admitted that what was paid is the least due the men.

The carriers were not being surprised as they admit (Brief, p. 59) they received written demands for the full wages due on January 9, 1929, a few months after the checks were made. The litigation in the state courts certainly apprised them of the contentions later made here.

It is true that the court pointed to the nearly five years delay in the federal court. But had an issue been presented and facts heard we are confident it would not have made the remark about laches.

In fact the carriers thought so little of the suggestion of laches that they presented no finding on it and none was signed.

VI.

The Claim Under the Judgment is for a Liquidated Amount: the Judgment Fixed the Rate of Pay and the Hours Involved Were Not in Dispute so that the Amount Due Was Merely a Matter of Arithmetic.

Under this heading the carriers argue that those portions of the judgment directing payment of overtime "are merely surplusage" (p. 64).

But those portions of the judgment are just as much part of the judgment as any other part of it. The last two paragraphs thereof read (R. pp. 33, 34):

> "It Is Further Ordered, Adjudged And Decreed that the * * * carriers * * * shall pay all overtime due or to become due in accordance with said Rule 8 * * *
>
> It Is Further Ordered, Adjudged And Decreed that the above named carriers shall * * * cause all of said employees to be paid all back pay retroactively or otherwise due to said employees or any of them in accordance with said award and this judgment, and respondent shall have its costs herein as taxed in the sum of ———— Dollars."

This is a judgment. No appeal was taken from it. No attempt was made to modify it or attack it as in excess of jurisdiction. Therefore it is binding upon the parties.

Note that "respondent" to-wit: the Union, is the party in whose favor costs are awarded. Counsel ask why therefore the Union took assignments from the men. The answer is obvious. We were dealing with a situation without precedent. We could take no chances on technical objections. By having the men assign whatever rights they had to the Union we prevented any argument as to proper parties.

The carriers argue that the claim of the men was unliquidated. But the judgment fixed the rate of pay. There was no dispute as to the hours worked because prior to the bringing of proceedings in the federal court the carriers had furnished us a statement of the hours involved to which we agreed so that all that was left was a matter of arithmetical calculation.

VII.

There Was No Accord or Satisfaction.

The carriers make no argument which was not anticipated in our opening brief. Nor do they dispute our statements of the law. They do attempt to distinguish our cases and cite various decisions in which the court found as a fact the existence of an accord.

We too could multiply cases in which the court found as a fact the nonexistence of an accord.

The real question is as to the application of elementary principles to the facts here.

In our opening brief we showed that two elements were lacking here. First, here there was no agreement that the checks be deemed in accord, and second, there was no consideration or "dispute" sufficient to support an argument for an accord.

On the second point the carriers try to find evidence to support a finding or inference of dispute by the statement that "Mr. Hancock did not agree" with Mr. Deal. *But there is not the slightest suggestion of testimony that Hancock ever communicated his disagreement to Deal or any-*

one else. On the contrary, the uncontradicted testimony is that Deal tried to get a statement out of Hancock (R. pp. 215, 206, 208-9). But was unsuccessful. Hancock expressly admits this (R. pp. 232-3, 235, 237). Deal said "there was not any controversy because there wasn't anybody to fight with me about it" (R. p. 214).

Letters From the Carriers in Evidence Show that They Did Not Consider the Cashing of the Checks to Constitute an Accord or Satisfaction.

In our opening brief (pp. 54, 56, 59-63) we cited cases in support of the elementary principle that there can be no accord or satisfaction unless the parties agree that the check shall constitute an accord. The cases say there must be an "explicit understanding," "a consent or meeting of the minds," that the check is accepted in full payment.

We cited the record to show that there was no "understanding" and quoted Hancock's testimony that the checks were subject to correction (R. p. 215).

That this was the understanding of the carriers, that the checks were not intended to close the rights of the men to their wages is shown by letters sent by each of the carriers to counsel for the men after written demand was made for compliance with the judgment.

In our letters of January 9, 1929 (R. p. 193), to the carriers, written a few months after the checks in question were issued, we called attention to various violations of the judgment by the carriers. Referring specifically to the wages involved in this appeal we said:

> "We are informed that you have not paid the back pay due from March 1, 1928, in full.
>
> "You will recall that notwithstanding the Arbitration Award required you to put in the eight-hour day

> as of November 1, 1927, you refused to observe the award, but on the contrary took an appeal therefrom and during the appeal did not put the eight-hour day into effect. While the appeal was pending by stipulation between us, which was incorporated in the judgment, it was agreed that if the order of the court was affirmed, the award, so far as hours were concerned, would be effective as of March 1, 1928, instead of November 1, 1927. Upon the appeal being affirmed, the rule as to hours was effective as of March 1, 1928.
>
> "**In all cases, therefore, where on and after March 1, 1928, you employed men on a 12-hour basis you became liable, in accordance with our stipulation and the judgment of the court, for overtime for the four hours each day that the men worked over eight hours.**
>
> "This, therefore, is to make formal demand upon you to comply with said judgment and the agreements between the parties with respect to the matters discussed."

Here is a plain statement of the basis of the present proceeding. If there had been a previous accord and satisfaction, if the checks were intended to foreclose any examination of the question as to whether or not the wages under the judgment had been fully paid or not, it would have been a simple thing to say so.

But of course no such result was intended. Counsel and the carriers knew that the pay checks had always been subject to correction and that these very checks were subject to correction.

Both carriers invited discussion. They did not even claim that the matter had theretofore been settled. The letter to the Southern Pacific Company was answered by Mr. Hancock's superior, F. L. Burckhalter, a copy having gone to Mr. Booth (R. pp. 195 and 199). The letter to the

Northwestern Pacific Railroad Company was answered by Messrs. Orrick, Palmer & Dahlquist.

Said the letter (R. pp. 201-202):

> "You refer to three alleged violations on the part of this company: First, that the men formerly working on the twelve-hour day have not received the proper amount of back pay in accordance with the agreement of the parties. We have taken this matter up with our steamship officials and, in our opinion, the payments which we have made to the men covering this back pay feature fully comply with the terms of the award and agreement."

Note that there is here no attempt to ignore the award, but rather a claim to "comply with the terms." If we are not satisfied we are invited to discuss the matter. No suggestion is raised that the matter was disposed of by cashing the checks. The letter concludes:

> "In the event that you desire to discuss with us any of the matters referred to in your letter, we would be glad to arrange a conference at which the contentions of both parties concerning the points raised in your letter could be thoroughly discussed."

The Southern Pacific letter states:

> "Your letter January 9th, with reference to alleged noncompliance with the judgment rendered by United States District Court on Sept. 29, 1928 in case of the A. T. & S. F. Ry. Co. et al. versus the Ferryboatmen's Union of California.
>
> "We know of no provision of the award of the Board of Arbitration nor in the judgment of the U. S. District Court referred to by you which would require this company to compensate its employes on the ferryboats on the basis recited in the next to last paragraph of your letter.
>
> "Please be assured that this company has allowed to its employes referred to by you back pay allowance

in accord with the provisions of the rules of the award of the Board of Arbitration.

'If you know of any rules in such arbitration award which support the claim contained in your letter we shall be glad to have you refer to same more specifically as the quotations of certain portions such award and judgment of the court as mentioned in your letter do not support your contention for the reason that nowhere in such quotations is mention made of basis of compensation.''

Note that there is no claim of settlement of any amount in dispute. There is no suggestion of an accord or satisfaction. On the contrary, the men are assured of the company's belief that it has acted ''in accord with * * * the award'' and the men are invited to refer the company to the provisions of the judgment relied on.

Would the carriers have invited discussion of the judgment if there was any idea that discussion had been foreclosed by a previous agreement for an accord and satisfaction.

VIII.

Costs Should Not Have Been Allowed the Carriers as Their Breach of Contract Made the Legal Proceedings Necessary.

In our opening brief (p. 76), we argued that costs should not have been allowed against the men because they were in good faith trying to settle what wages were due them and that the difficulties were due to the fact the carriers had violated their agreement to put the award into effect immediately.

The carriers say (p. 99), ''it is not true'' that they violated any agreement to abolish 12-hour watches upon the

rendition of the award. This agreement has already been quoted earlier herein and is found in the arbitration agreement (R. p. 86).

The carriers protest there was no agreement not to resort to the courts and that they should not be penalized for resorting to the courts.

Of course the carriers had the right to appeal to the courts. But when they signed the arbitration agreement they knew that the exercise of that right would take many months. Yet they agreed to make the award

> "effective on the first day of the month following the date on which the award is filed" (R. p. 86).

Pending the appeal they should have observed the agreement to make the award effective and there would have been no problem of enforcing the abolition of 12-hour watches retroactively.

The carriers broke their word in a gamble to reverse the award on appeal. The carriers lost that gamble and the men should not be penalized for seeking judicial construction of the difficulties thus created by the carriers breach of agreement. The costs of determining legally the effect of the carriers' violation of contract should not be assessed against the men.

Conclusion.

The judgment and the award plainly abolished 12-hour watches. Under the arbitration agreement, the 12-hour watches should have been abolished nearly a year prior, to wit, in November, 1927. The judgment says the abolition

of 12-hour watches was "effective as and from March 1, 1928" (the later date being fixed by stipulation).

The carriers are forced to argue that notwithstanding the agreement for immediate action on the award, notwithstanding the plain terms of the judgment, 12-hour watches were proper as and from March 1, 1928, because the award was "in suspense".

We find no warrant for the suspension—no authority is cited, no agreement to that effect claimed. We look at the suspension hypothesis as a fallacious argument devised to justify a breach of faith on the part of the carriers, a plain ignoring of specific terms of the judgment, as an attempt to make the men pay for the carriers' gamble to maintain as long as possible by appeal to the courts the barbarous and inhuman checkerboard system of 12-hour watches.

The facts as to what the carriers did are undisputed. The hours worked by the men are undisputed. The rate of pay called for by the judgment is undisputed. This court should therefore reverse the decrees below and the trial court ordered to enter judgment with interest for the unpaid wages due the men.

Dated, San Francisco,
May 13, 1936.

Respectfully submitted,

DERBY, SHARP, QUINBY & TWEEDT,
S. HASKET DERBY,
JOSEPH C. SHARP,
Attorneys for Appellants.

No. 8117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

APPELLEES' PETITION FOR A REHEARING.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellees respectfully petition the Court that the above entitled appeals be reheard and reargued

before it with such permission to appellants and appellees to file additional briefs as well as orally to argue, as the Court may deem desirable.

At the outset we make it plain that we ask for no rehearing on the questions of the allowability of interest or the defenses of release and accord and satisfaction. The Court was unanimous on those points, and we feel that we should not further press them.

But we do desire to insist, as earnestly as we may in genuine deference, that the majority opinion is erroneous in that it has misconstrued the status of both classes of appellants' assignors under the award, even giving that award a retroactive effect, as it must be given; that it has been persuaded by arguments and isolated bits of testimony collateral to the main issue to remand the case for an assessment by the District Court for overtime that is neither within the spirit or meaning of the award—retroactively applied —nor at all consistent with the record facts, or even with the language of the majority opinion.

Moreover, that one important class of claims—the "broken assignment" claims hereinafter discussed—are, apparently, not even considered in or passed upon by the majority opinion.

We feel that a rehearing should be granted for a further purpose, namely, to lay down a *definite* rule or rules for the District Court to follow in both classes of cases if this Court shall on rehearing again conclude to reverse the decree of that Court, but shall again, as does the majority opinion, order that Court, to "proceed with the trial".

We respectfully contend that the paragraph on page 5 of the printed opinion, reading:

> "The accounting is a matter for the trial court, and should be conducted on an interpretation of the award which will give to the members of the crews overtime for any day's services for the hours *in excess of any eight hours* in that day. Since the hourly overtime is the same as hourly straight time, it is only necessary to compute the straight time hourly wage;"

considered in and of itself as a rule to be followed by the District Court fully justifies and sustains the payments actually made the plaintiffs' assignors when their six months' service on the 12-24 hour watches ended with the entry of judgment by the District Court after affirmance of the award by this Court.

We stress the phrase in the quotation next above that the "interpretation of the award" (shall be that) "which will give to the members of the crews overtime for any day's services for the hours in excess of any eight hours in that day" and that it is "only necessary to complete the straight time hourly wage".

We respectfully insist that the evidence shows, time and again, without contradiction, that the formula there stated does, when applied to each of plaintiffs' assignors, give him exactly what he has already received—a rate per hour for the time actually worked (and all of the assignors worked full twelve hour watches, it being conceded that overtime over twelve hours on any one watch has been fully paid for) identical with that which an 8-16 hour man would have been paid under and after the award if he had worked

the same hours per day on the same days as the 12-hour men, plaintiffs' assignors.

Neither the so-called Hancock formula nor what he thought it meant has anything to do with the ultimate merits of the case. The essential question is: What should the plaintiffs' assignors have been paid had no effort been made to set aside the award and had they continued to work on 12-24 hour watches, and having determined what they should have been paid, were they actually paid that amount?

TWO DISTINCT CLASSES OF CLAIMS.

There are two, and but two, classes of employees involved:

First: Those who did not work all of the 20 or 21 watches in a given month, (the number of watches depending on the month), on the 12-24 hour basis. Those months are *"broken assignment months";*

Second: Those who worked each and all of the 20 or 21, 12-24 hour watches in a given month which we hereinafter term "full service" men. Those *full months* are in a separate class and will be separately treated.

From a large photostatic reproduction of Plaintiffs' Exhibit 8-A relating to Southern Pacific Co., not included in the copies of the Record, filed with the original record and which we respectfully ask the Court to examine, it will be seen that few men worked every 12-24 hour watch every month during the six months in question. The same is true of the Northwestern

Pacific men. Each calendar month was treated separately, and during the six months paid for separately. If a 12-24 hour man worked all of the 12-24 hour watches in a given month of that six months, he received a month's salary, which was exactly the same as that of the eight hour men of his class who worked all of the 26 or 27 eight hour watches during that month. There is no question whatever as to the correctness of the statement just made and the evidence clearly so shows.

If the 12-24 hour man worked less than the full 20 or 21, 12-hour watches in a given month he was in an entirely different class. He was on a "broken assignment" not entitled to a monthly wage, either as an 8-hour man, or, prior to the award as a 12-hour man.

We shall first deal with the "broken assignment" months of which there are many, as shown by the photostat above referred to, which months and the employers' obligations arising therefrom appear to have been entirely overlooked in the majority opinion.

BROKEN ASSIGNMENT MONTHS, WHERE A MAN WORKED LESS THAN THE FULL 20 OR 21, 12-HOUR WATCHES FOR THAT MONTH.

Let us first consider the contract provisions, *as the contract was amended by the award* and which relate to "broken assignment" compensation, and then consider what the uncontradicted testimony shows was the proper basis of pay for an eight hour man who worked a "broken assignment" in a given month. It will be shown that plaintiffs' assignors who worked

"broken assignment" months received exactly the same pay as though they had been eight hour assignment men who worked twelve hour watches on the same days.

The difficulty in applying the contract as amended by the award—and which as amended provided only for eight hour regular assigned watches—is more superficial than real.

By the stipulation in May, 1928, made pending appeal by the carriers to this Court it was provided (R. 29) that if this Court affirmed the award, as it later did, "the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927" (when but for the impeachment proceedings they fully would have taken effect), "to March 1, 1928."

The "new watch rules", so far as here applicable, consisted solely in the award amending Rule 6 so as to leave out the provision for a 12-24 hour watch for assigned crews.

Rule 6 originally read (Agreement of January 16, 1925) (R. 70):

> "*Rule 6.*
>
> Assigned crews, except as hereinafter provided, will work either on the basis of:
>
> (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off.
>
> or
>
> (b) Eight (8) hours or less on watch each day for six (6) consecutive days."

The submission to arbitration provided (R. 84)—and under the Railway Labor Act the submission is jurisdictional in the fullest sense of that term—that:

> "The specific questions submitted under Rule 6 are:
>
> (a) Shall the rule remain as written, or
>
> (b) Shall the portion of the rule down to the word 'Exceptions' be changed so as to read:
>
> > (Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days, and
>
> (c) If the rule is changed as under (b) hereof, whether, and if so to what extent, the exceptions shall be changed."

The Award and Decision which begins at R., page 24, after increasing rates of pay by $10.00 per month —not involved here (R. 173)—provides a new section 6 down to the word "Exceptions" in the following language (R. 25)—no service under the "Exceptions" being here involved:

> *"Hours of Service*
>
> Rule 6.
>
> Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days."

The *only question relative to overtime* that was submitted to arbitration is stated in the agreement to arbitrate (R. 84) as follows:

"Rule 8—Overtime

(Present rule reads as follows)

'The monthly salary now paid the employes covered by this Agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate.'

"The specific questions submitted under Rule 8 —Overtime, are:

(a) Shall the present rule providing for pro rata rates of pay for overtime remain in effect, or

(b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?"

The Board answered that question by re-adopting the existing Rule 8, thus denying time and one-half for overtime—such re-adoption appearing in the award as follows:

"do hereby award and decide as follows regarding the specified differences:" (R. 25.) * * *

(R. 27-28) *"Overtime*

Rule 8.

The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate."

The agreement to arbitrate, as was entirely proper and necessary under the Railway Labor Act, provided (R. 85):

> "Fifth: In its award the Board shall confine itself strictly to decision as to the questions so specifically submitted to it."

But all the time, before the agreement to arbitrate was executed, during the arbitration proceedings and the impeachment proceedings and up to the time of trial there were other provisions that were not submitted to arbitration, that were of equal standing with the sections quoted above, that were untouched and unaffected by court proceedings or judgment, that must be considered *in pari materia* with all other sections of the agreement as amended by the award and that fixed and defined the basis of pay for a "broken assignment" month.

Those provisions—unchanged and unaffected by the award—are (Contract, R. 69)—appended as a note to Rule 2 which fixed the *monthly* rates of pay. (R. 69.) Rule 2 was changed by the award in but one respect, the only respect as to which the Board had jurisdiction by increasing by $10.00 the monthly rate of pay. (Award, R. 25.) The Note to that section was not submitted to the Board (Arbitration Agreement, "Fourth", R. 82) and was not changed by the award. (Award—"Rates of Pay", R. 25.)

That note, which is governing and fully controlling as to all of plaintiffs' assignors read in the contract and still reads (R. 69):

"NOTE: Employes working *broken assignments* will be paid in the following manner:

(a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.

(b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365.

(c) On 12 and 24 watches, with one watch off per month, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary, divided by 347.

Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service."

Evidently the Arbitration Board let stand sub-sections (b) and (c) of the note because it had no power to change them; or, perhaps, because it may have felt that in some way they applied to the 12-24 hour watch *provided for* in Exception 7 to Rule 6. (R. 26.)

In any event we are not here concerned with sub-sections (b) and (c) of the Note next hereinabove quoted.

What is apparent and conclusive was that the award plus the unamended portion of the contract did these things as to "regular assigned crews":

(For convenience, throughout this petition, we shall refer only to firemen as the rules governing all classes of employes were the same before as well as after the award, the only difference being in the rate of monthly pay.)

1. The monthly pay of firemen was raised to $146.35 per month. (Award R. 25.)

2. Rule 6 was changed by the award so as to abolish 12-24 hour watches for "assigned crews" and so as to read:

> "Hours of Service
>
> Rule 6. Assigned crews will work on the basis of eight (8) or less on watch each day for six (6) consecutive days."

3. The exception of the monthly rate of pay, Rule No. 6, was left unchanged and read:

> "NOTE: Employes working *broken assignments* will be paid in the following manner:
>
> (a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.
>
> * * * * * * *
>
> *Above applies to employes, whose monthly assignment is broken* as well as to relief employes and those in extra service."

4. The overtime rule (Rule 8) was unchanged by the award and provided (R. 27-28):

> "Overtime
>
> Rule 8.
>
> The monthly salary now paid the employes covered by this agreement shall cover *the present recognized straight time assignment.* All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate."

5. Rule 9, for computing overtime was not submitted to the Board, which did not attempt to change it and, so far as applicable to 8-hour watches read as in the contract of 1925 (R. 72):

"Fixing Overtime Rate

RULE 9.

To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment.

NOTE: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner:

(a) On 8 and 16 watches, divide 12 times the monthly salary by 2504."

The majority opinion (opinion p. 5) quotes that Rule 9.

What is a "broken assignment"?

The Note to Rule 2—unchanged by the award and above quoted—uses the expression "broken assignments" and provides a formula under which "employes working broken assignments will be paid." In the last sentence of the Note appears the provision (R. 69):

"Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service."

No definition of "broken assignment" is found in the testimony or exhibits until plaintiffs' rebuttal closed. Probably counsel on both sides were so familiar

with the term and its application that its precise definition was overlooked in both the plaintiffs' and defendants' case in chief and in plaintiffs' rebuttal.

Feeling that that omission should be supplied, defendants' counsel near the close of the evidence sought to supply it, and the following colloquoy took place (R. 290):

> "Mr. Booth. We ask counsel to stipulate that the term 'broken assignment' as used in the note to Rule 2, of the contract of 1925, Plaintiffs' Exhibit Number 2, means a case where an employe on a regularly assigned crew, as defined in Paragraph (a) and/or (b), of Rule 6 of that agreement, failed to work continuously throughout the calendar month on the entire series of watches which were included in the regular monthly assignment of watches for that month for the regular assigned crew of which he was a member.
>
> Mr. Sharp. Now, may I add at that point; Counsel's statement is correct, with two limitations. The term 'broken assignment' covers the situation where a man did not work all of the assignments which the company assigned him to. Now, the reason I make that limitation is, I do not want counsel to argue afterwards that the situation here involved, *where the men worked all the assignments the company actually assigned them to, is a situation of broken assignments.* Our contention in that regard is, if the company assigned the men to work on 20 or 21 watches a month, that was a full assignment and not a broken assignment, but with that limitation, which is that where a man fails to work voluntarily, or fails to work less than the full number

of watches assigned by the company, that is designated in the agreement as 'broken assignments.'
The second limitation which I want to make with respect to that is this: It is self-evident, but I want to be sure there is no misunderstanding. The term 'broken assignment' as stated in counsel's requested stipulation, refers to Rule 6 (a) and/or Rule 6 (b). Of course, it is the contention of the Union that as of March 1, 1927, there was not any '(b)' part to the rule at all, and that the only rule in existence as of that date is the one calling for eight-hour watches. So we do not want to be deemed to be stipulating that a man working on a twelve-hour watch came within the rule, because there was no such rule. But I think that gives counsel what he asks for."

At the time, the reservations made by Mr. Sharp were not regarded by us as satisfactory. Looking at them in cold type it seems that he answered our question in the affirmative, and that his first reservation merely means that the first class of cases we are now discussing—those when an assignor of plaintiff "failed to work continuously through the calendar month" all of the 20 or 21, 12-24 hour watches in that month—are true cases of "broken assignment months"; analysed, his stipulation means nothing less.

But at the time we were not satisfied with the reply and we proceeded to show what "broken assignments" actually meant.

We at once recalled Witness Gorman who had previously testified (R. 252):

"I am employed by the Southern Pacific Company. At the present time as trainmaster's clerk. I handled the payrolls of the steamer division from the latter part of 1923 to the latter part of 1930. I am familiar with the adjustment that was made in September and October, 1928, with the former 12 and 24 hour men. I prepared the payroll on which these pay checks were based."

(We apologize for devoting so much space to record quotations but feel that it may be more convenient for the Court to read the testimony in this form than to be referred to various pages of the record.)

Mr. Gorman, when re-called, as above stated, said (R. 292-294):

"Mr. Booth. Q. Mr. Gorman, when a man on an 8 and 16 hour watch or a 12 and 24 hour watch, worked on any one or more watches less than the full number of assigned watches for that month, it has been stipulated here that that is regarded as a broken assignment. Is that the manner in which the payrolls were prepared?

A. Yes, sir, on the broken assignment basis.

Q. Now, when a man worked on all the assigned watches during the month, but on one or more watches he voluntarily worked less than the 8 or 12 hours prescribed for that watch, was that regarded as a broken assignment? I do not refer to a case where the company itself laid up a boat short of the full eight hours.

A. If he did not fulfill his full series, why, it was a broken assignment.

Q. Suppose on a 21-watch assignment, a man worked twenty full twelve hour watches, and one

watch, voluntarily, of ten hours, was that regarded as a broken assignment? A. Yes, sir.

Q. Were the payrolls made up on that basis?

A. Yes, sir.

Q. In the case of a broken assignment where less than the full number of watches were worked, was the man paid by the day? A. Yes, sir.

Q. The agreement of 1925 provides, in Rule 2, for a method of ascertaining the daily pay. Now, was that, in practice, modified by an interpretation issued by Mr. Hancock on May 1st, 1926?

A. Yes: that was modified by Mr. Hancock's interpretation.

Mr. Booth. I have here a copy of that memorandum, which is initialed as I understand it, by Mr. Deal, and I would like to put it in. It is our file copy. I would like to have it copied in the record. It is very long, and I do not think it is necessary to read it in full at this time.

Mr. Sharp. I would like to have it in as an exhibit, instead of putting it in the record.

Mr. Booth. It has Mr. Deal's initials on it.

Mr. Sharp. Mr. Deal tells me he did initial a copy.

Mr. Booth. Q. Under this interpretation of May 1st, 1926, when an 8-hour man worked a broken assignment, how did you arrive at the daily rate of pay?

A. We took the number of days his crew would work in the month and divide that into his monthly salary and establish a daily rate of pay for an eight hour day.

Q. When a man on a 12-hour assigned watch worked less than the required number of watches, under this interpretation, how did you arrive at his daily rate of pay?

A. If he was on a 21-watch assignment, we would divide 31½ into the monthly rate and would then obtain an eight-hour rate of pay and we would pay him 1½ days at the 8-hour rate of pay.*

Q. At the 8-hour rate of pay on the 12-hour basis. A. Twelve hour basis, yes.

Q. And if he worked on a 20-watch assignment, was the same method followed?

A. The same method; only we would use 30 as the divisor.

Q. Was this memorandum of May 1, 1926, modified subsequently to change the divisor in the case of any of these 12-hour men, and, if so, how?

A. Yes. The memorandum of May 1st shows that in the case of a 21-watch assignment, you would use a divisor of 1/31st, and on the memorandum of May 25th it corrected that so you would use a divisor of 1/31 and ½.

Q. Was that the method that was subsequently followed in making up the payrolls?

A. Yes, sir."

Mr. Gorman's testimony just quoted was explained further by Mr. Hancock (R. 315) by saying that a further change on May 25th or 26th, 1926, in the memorandum of May 1st, 1926, was made to take care of an occasional situation. We quote (R. 315):

"Mr. Booth. Q. Mr. Hancock, you heard Mr. Gorman's testimony this morning regarding the memorandum of May 1, 1926, and the subsequent memorandum of May 25th or 26th, 1926, which slightly changed that memorandum?

---

*That is exactly what was done in "broken assignment" months in the instant case.

A. Yes, sir, it was slightly changed. Mr. Deal called my attention to the fact that a 12 and 24-hour man starting his first watch early in the month would actually have 31½ days service in a 31-day month.

Q. In other words, if you followed the formula of May 1, 1926, he would get a half a day the worst of it on a broken assignment?

A. Yes, sir.

Q. I ask you whether this memorandum applied to the Northwestern Pacific, as well as to the Southern Pacific?

A. I would not be able to answer that. Copies of it were furnished to the Northwestern Pacific, but whether they placed them in effect, I could not testify.

Q. Were these memoranda reached after a conference between you and Mr. Deal?

A. Well, Mr. Deal was consulted with and had to do with the preparation of the memorandum. He initialed them when they were completed.

Q. And after they were reduced to mimeographed form, did you send him copies of them?

A. Yes, sir.

Q. Was there ever, to your knowledge, any complaint from Mr. Deal or anyone else regarding the interpretations as set forth in the memoranda?

A. Only as to the suggestion with respect to the 31½ eight hour days."

To summarize:

An eight hour fireman, after the award was entitled:

If he worked all watches in a month, to $146.35

If he worked eight hours or less on a "broken assignment"—for each eight hour day, to 5.6109

If he worked over 8 hours on any one watch, he was entitled per hour to .7014

which overtime rate per hour was the same as the straight rate.

What the 12-24 hour "broken assignment" men were actually paid during the six months and by additional checks.

There is no dispute as to this. The amounts paid them for each twelve hour watch on a broken assignment are separately shown on the large photostatic Southern Pacific Table, Plaintiffs' Exhibit 8A, filed herein with the original record. The payments are also testified to at R. 252-261, by Gorman, who made out the payrolls for the additional checks (R. 252-261); and further by him when recalled (R. 306-308).

On page 307 is a table showing what a 12-24 hour fireman on a broken assignment was paid during the 6 months and what he additionally received at the end of the said six months.

The net result therefore is that if an eight hour man or any other member of an assigned crew did not work all of the watches in a calendar month he worked a broken assignment and was to be paid on the basis of the Note to Rule 2—which note was not

changed by the award and is quoted above (also R. 69).

Still taking a fireman, to avoid constant qualification and explanation.

Under the award (R. 31) a fireman's pay was increased to $146.35.

Applying subdivision (a) of the Note to section 2, (R. 69)—"allow for days worked on the basis of 12 times the monthly salary divided by 313"—produces $5.6109 per day for an 8 hour fireman.

Using the formula for the ascertainment of the hourly rate for an eight hour fireman one must use the overtime rule, Rule 9, (quoted on page 5 of the majority opinion) because as there said (Opinion, p. 5) "hourly overtime is the same as hourly straight time." That formula is: "on 16 watches, divide 12 times the monthly salary by 2504."

Under that formula the hourly rate for an eight hour fireman was 70.14 cents.

Those figures are considered by appellants' Brief to be correct mathematical computation. (Brief pp. 32, 33, 34.)

It appears that for each 12 hour watch on the broken assignment the fireman was paid on the basis of 1 and ½ eight hour days at the *12-24 hourly rate of* 60.14 cents (as increased by the award). There is no question as to overtime over 12 hours; that has been fully paid at the 8 hour watch hourly rate.

At the expiration of the six months from March 1, 1928, and when this Court had affirmed the District

Court, this same 12-24 hour fireman who worked on a broken assignment was paid the difference per hour between the 60.14 cents already paid him (the 12-24 hour watch hourly rate) and the 70.14 cents hourly rate for an eight hour fireman.

Putting it another way, the "broken assignment" 12-hour fireman was paid for the broken assignment month at the end of that month what he would have received for the "broken assignment" if the 12-24 hour watch rule had been in effect (as the monthly pay was increased by the award) and then at the end of the six months he was paid an additional sum that brought his total pay for each 12 hour watch up to an amount equaling 1 and ½ days at the increased eight hour rate.

There can be no question whatever about this. The photostatic exhibit, Plaintiffs' Exhibit 8a, shows it beyond question and stands uncontradicted. Plaintiffs offered that exhibit as "certain payments made on account of back pay." (R. 148.) But the payments were made and they speak for themselves.

These broken assignment payments have been entirely overlooked in the majority opinion although they constitute a very substantial part of the amount sued for (see table comparing fully monthly and broken monthly assignments, S. P. Co., Ex. 8a, R. 309). Virtually, the majority opinion deprives appellees of any consideration of this feature of the case. So also does it deprive the District Court, if the case be

remanded for further hearing, of any intimation as to what the majority of this Court found the proper retroactive pay to be as to broken assignments.

Typical illustrations of basis of payments actually made for services during broken assignment months:

In the findings (R. 132 and 133) will be found two tables that illustrate just what was paid currently to a 12-24 hour man who was a "broken assignment" man and what he additionally received. These tables are based on Plaintiffs' Exhibit 8a and on Gorman's testimony, both of which are undisputed.

First it should again be stated that under the amended award an 8-16 hour fireman's pay was:

Per eight hour day	$5.6109
Per hour—straight time or overtime	.7014

Fireman Conrad Anderson, No. 2 on Plaintiffs' Ex. 8a, worked only one (1) 12 hour watch in August, 1928, on a 21 watch assignment.

Paid at the end of August (Ex. 8a, Gorman, R. 265)	$6.97
A 21 watch assignment on a 12-24 hour basis produced under (b) of the Note to Rule 2 (R. 69) a daily rate of $4.646, 1½ times which is $6.97	
By the final check he was paid	1.44
	$8.41

Abridging and clarifying the two tables the following results are shown:

That Anderson was paid 1½ days at the 8-16 hour daily rate of $5.6109		$8.41
1 day at the 8-16 hour daily rate	$5.6109	
plus 4 hours overtime at the 8 hour overtime rate of $.7014	2.8056	$8.41

That amount of $8.41, barring a fraction of a cent, is what an 8-16 hour man would have received if he had worked one watch in a month for 12 consecutive hours; he would have been paid:

8 hour daily rate	$5.6109
4 hours overtime @ $.7014	2.8056
	$8.4165

Is the District Court on a remand, if one be the result of this petition or any rehearing that may be granted, to go further and give Anderson any more than he has already received? Certainly he is not entitled to a month's pay for one 12 hour watch. This is not a punitive proceeding. The entire controversy sounds in contract. The contract is not a unilateral one; the men are bound as well as the company and when we stipulated (R. 29) that the "new watch rules" should be retroactive to March 1, 1928, if this Court affirmed the District Court's decree, we cer-

tainly did not stipulate—nor can any fair construction of the stipulation bind us—to pay the men who worked "broken assignment months" on any other basis than we would have paid an eight hour man had we required him to work the same number of 12 hour watches in a "broken assignment month."

Nor does the judgment impair the basis on which the "broken assignment" assignors were paid.

The judgment provides (R. 33) that the carrier:

> "shall pay all overtime due or to become due in accordance with said rule 8, said rule reading as follows:
>
> 'OVERTIME
>
> RULE 8.
>
> The *monthly salary* now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the *monthly salary* at the prorate rate' ".

But neither Anderson nor any other of plaintiffs' "broken assignment" assignors received a *monthly salary* and therefore the overtime rule, No. 8, is inapplicable to them.

To find out what is applicable we must go back to rule 5 (R. 70) that:

> "RULE 5.
>
> Eight (8) consecutive hours shall constitute a day's work."

As to eight hour men, therefore, any hourage over eight hours was and always has been overtime, computable under Rule 9, and the note thereto quoted in the majority opinion (p. 5); and if an eight hour man worked a "broken assignment" in a given calendar month he received pay for an eight hour day under subdivision (a) of the Note to Rule 8 (R. 69) —unchanged by award—and if he worked overtime he received pay for overtime under Rule 11 (R. 73) —overtime computed on actual method of computation, provided for in Rule 9,* which is exactly the way plaintiffs' "broken assignment" assignors were treated by the final settlement.

From Plaintiffs' Exhibit 8a we could multiply the Anderson illustration indefinitely. The figures are therein set forth and we understood are unquestioned.

But there is one further illustration we desire to give because it shows a fireman who did not work all of the 20 or 21, 12-24 hour watches in any one of the 6 months; in each month he was a "broken assignment" employe. The table is contained in the Findings (R. 133); it is not the conclusion or construction of the District Judge, but is a summary of undisputed evidence. (Plaintiffs' Ex. 8a, Gorman R. 253-254; 306-307.)

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*Note: There were some minor inequalities that arose from time to time and that were adjusted by the interpretive memoranda described and set forth in pages 293-305 and 315-316 of the Record; but those are unnecessary complications to be dealt with here, as this discussion is on general principles to be applied.

We abridge and thereby somewhat clarify the table.

Fireman Louis J. Leimar, No. 48, Pltffs. Ex. 8a, p. 1.

12-24 hour fireman

(Daily rate for 8-16 hour fireman $5.6109

(Hourly rate for 8-16 hour fireman .7014

	"No. of 12-hr. watches	Paid Each Mo.	Paid Sept., 1928	Total Paid
March	11	$ 79.10	$13.48	$ 92.58
April	1	7.32	1.10	8.42
May	12	86.06	14.93	100.99
June	19	139.03	20.88	159.91
July	19	139.03	20.88	159.91
August	19	132.41	27.50	159.91
	81	$582.95	$98.77	$681.72

(a) 81 12-hr. days=121½ 8-hr. days at $5.6109=$681.72

(b) 81 12-hr. days=972 hours at .7014=$681.72

(c) 81 12-hr. days=

81 8-hr. days at $5.6109 or $454.48

324 hours overtime at .7014 or 227.25

$681.72"

It is perfectly obvious that there was no "monthly salary" paid Leimar to which Rule 8, the overtime rule, could be applied as in no month did he work the full number of watches. Therefore in each month he worked a "broken assignment" as referred to in the

Note to Rule 2 (R. 69) or as expressed in the last sentence of that Rule, in each month he was an employe whose "monthly assignment is (was) broken."

It is indisputably and mathematically true that, no matter how the payments to him be analyzed, whether by the month, or by the entire period, or under any of the methods (a), (b) or (c) shown in the above table, the result is the same—he received the full daily pay of $5.6109 of an 8-16 hour fireman (as increased by the award) for the first 8 hours of each 12 hour watch and the full hourly rate of such 8-16 hour fireman—$.7014 for each of the four hours he worked in excess of the eight hours.

We again accent that we are now talking about "broken assignment" months, not about months in which a 12-24 man worked each of the 20 or 21, 12-24 watches during that month. With that phase we will next deal.

The majority opinion says:

> "The first disputed question is whether overtime shall be paid crew members working 12 hours in a day in addition to the monthly salary referred to in Rule 8. The appellees claim that the phrase 'All service hourage in excess of the present recognized straight time assignment' does not mean in excess of an assignment of eight hours per day provided in Rule 6, but that it means in excess of 48 hours per week of total time.
>
> 'Mr. Sharp. (For seamen.) As a part of this formula, will you state whether the formula contemplated that before a 12- and 24-hour man

should be entitled to any overtime he should give 48 hours' service in a week.

'Mr. Hancock. (For ferry owners.) That is correct.' "

The above quotation (from R. 225) which is that relied on by appellants, does not go far enough. From succeeding testimony by the same witness it is perfectly plain that Mr. Hancock was referring to a case where a 12-24 hour man worked an entire month and during one of the weeks of that month worked only 48 hours. He correctly says that in calculating what was due him for that entire month he received no credit for overtime *as such during that 48 hour week.* But in adjusting in the final settlement his additional pay for that month in which he worked every watch, and paid for on the same basis as the 8-16 hour men (R. 225-226) every hour he worked over eight hours in one watch was taken into consideration.

Later he made that clearer if indeed what was actually done is not conclusively shown by plaintiffs' exhibit 8 A (the photostat).

It is apparent from the following that Mr. Hancock, in referring to a 12-24 hour man working a 48 hour week was referring to such a man who worked the entire month:

(Cross-ex. R. 239.)

"Q. Now in the week in which a man worked 48 hours, under your formula, if you were entitled to 48 hours work before the man is entitled to overtime, under your formula he would get no overtime at all for that week.

A. He would have worked 48 hours. But you will remember *that man was paid on a monthly basis.* Q. Yes.

A. *He was paid on a monthly basis.* That is the angle that you must consider there.

Q. Yes, I am glad you brought that out. But let me still direct your attention to the week in which he worked four 12-hour shifts, or a total of 48 hours. Under your formula, the man having been paid a monthly salary, was entitled to no overtime pay at all because he had worked no overtime, because he had worked only 48 hours that week.

A. No. *If you allocate it down to the individual week* in which the man through the alternating of the crews only worked the 48 hours, my formula if applied to a man who worked under a broken shift arrangement, only four shifts, or 48 hours within that week, he would not have any overtime.

Q. And as a matter of fact, that was the method you applied in figuring the overtime checks, samples of which have been introduced in evidence?

A. The formula says that they will be taken by the month."

Mr. Hancock testified (R. 220) that he prepared a formula upon which the back-pay checks were issued.

That formula, printed in R. pp. 220-222 after stating the increased monthly, daily and hourly rates for each class, states that the balance due should be arrived at by taking "the total number of eight (8) hour days, and the number of hours overtime served during a month, and multiply the same by the above

enumerated daily and hourly rates, then allowed as additional compensation, the difference between the total so obtained and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be reduced to a certain additional amount per day or hour, and so shown on the payroll for more complete record purposes."

He denied most emphatically that all of the hours for the six months were lumped together and a divisor used (R. 224) and points to the formula as requiring the six months to be computed separately.

Mr. Gorman, who prepared the pay-rolls, testified (R. 252) that he followed the Hancock formula.

As to "broken assignment" months what else could have been done than use the Hancock formula? (We will come to the "full-service" months later).

That formula for back pay provided in terms and effect as we have seen:

1. That the computation be made by the calendar month.

2. That the total number of 8 hour days should be taken, and "the number of hours overtime served" during that month.

3. That those two items should, respectively, be multiplied by "the above daily and hourly rates" i.e. in the case of a fireman the 8-16 hour rate of $5.6109 per day and 70.14 cents per hour.

4. That from that total should be deducted what had already been received by the employe

for that month (not including special adjustments e. g. overtime over 12 hours).

5. That the balance thus arrived at should be paid.

That course was followed, as we have shown above, by the two typical examples of broken assignment cases and, as plaintiffs' Ex. 8A shows, as to all broken assignment cases.

The final result as to broken assignment months was to give the 12-hour employe exactly what the eight hour man would have received if he had worked the same number of 12-hour watches. What else could have been done? Rule 8 as we have shown was inapplicable because no monthly wage had been earned or paid. Surely in the face of appellant's positive reiteration that under the retroactive clause the twelve hour watch rules should be considered as non-existent during that six months, there is no basis for claiming that the broken assignment men were entitled to retain 1½ days pay at the 12-24 hour rate for the first 8 hours of each broken assignment watch (which was what they have been paid monthly during the 6 months) and receive in addition to that 4 hours overtime at the 8 hour rate. Yet that is precisely what appellants' claim amounts to. In one breath they say the 12-24 hour watch and everything in the rules pertaining to it retroactively went out of existence, and in the next that they can as to "broken assignment" months retain for the first 8 hours of each 12 hour watch the 1½ days' pay received by them monthly

for the entire 12 hours, and in addition exact 4 hours overtime for the remaining four hours.

And we respectfully insist that neither that claim nor our claim that the broken assignment months have been paid for in full, has been passed on by the majority opinion.

Under what rule, may we respectfully ask, is the District Court to pass on this "broken assignment" question, if the case be remanded in the present state of the record on appeal?

We feel that we have paid these broken assignment claims in full but, may be respectfully ask, is that the opinion of this Court? And if the Court is not of that opinion, on what basis, we again respectfully ask, should we have paid the back-pay or overtime, if that term be preferred, for the six months in question on these "broken assignments"?

The majority opinion says (p. 3):

> "The first disputed question is whether overtime shall be paid crew members working 12 hours in a day in addition to the monthly salary referred to in Rule 8. The appellees claim that the phrase 'All service hourage in excess of the present recognized straight time assignment' does not mean in excess of an assignment of eight hours per day provided in Rule 6, but that it means in excess of 48 hours per week of total time."

But obviously Rule 8 is out of consideration as to a "broken assignment" month, because no monthly salary was paid for that month. We think it equally obvious that the learned author of the opinion had in

mind in the first sentence just quoted a case where a man received a monthly salary for a given month. But if he did, and we so construe the sentence, how is the District Court, if the case be remanded, to construe the language on page 5 of the Opinion that—

> "The accounting is a matter for the trial court, and should be conducted on an interpretion of the award which will give to the members of the crews overtime for any day's services for the hours *in excess of any eight hours* in that day. Since the hourly overtime is the same as hourly straight time, it is only necessary to compute the straight time hourly wage."

But what basis is to be used for computing the pay for the first "eight hours in that day" on the excess over which the District Court is to compute overtime "at the straight time hourly wage"? Certainly in the case of a broken assignment month the monthly salary rate of $146.35 cannot be used in combination with Rule 8 because no monthly salary was earned and none was paid, nor was it ever claimed or demanded by the men.

As to the "broken assignment" months, we think it must be concluded that the majority opinion left those out of consideration and dealt solely with full service months where a monthly salary had been paid. (See such a case in Finding XV, Table, R. 134.) The entire majority opinion—in its discussion of overtime rates—applies to any one of the months, or to all of them, in the Table in Finding XV (R. 134). It indubitably does not apply to "broken assignment" months.

There are many of these. In the table on page 309 of the Record it is shown (col. 3) that the total number of 12 hour watches in broken monthly assignments here involved are 6189 on the Southern Pacific and 914 on the Northwestern Pacific, as against 1106 full monthly assignments at 12 hours each—20 or 21 watches per month—on the Southern Pacific and 116 on the Northwestern Pacific, of 20 or 21 watches each.

We most respectfully but most earnestly insist that as to these "broken assignment" months, the men in any view of the case and even under the majority opinion have been paid in full; but nevertheless we feel that the District Court as well as the parties are entitled to a clear and unambiguous rule or formula from this court on that point so that, if the case be remanded, the District Court will have an authoritative rule to follow, and so that neither party will feel constrained again to appeal to this court from the decree of the District Court.

We pass now to the full-service months—an entirely different question as the majority opinion has, apparently, viewed the issues in this suit.

THE FULL-SERVICE MONTHS.

We use the expression full-service months as a short description of calendar months in which an assignor to plaintiffs worked all of the 20 or 21, 12-24 hour watches that fell within that calendar month and was paid the monthly rate as increased by the award in the case of a fireman—$146.35.

Any month worked by Fireman Costa as shown in the Table in Finding XV (R. 134), is a "full-service" month.

As to *this class of claims,* we respectfully beg to differ from the majority opinion (p. 3) when it says that the "first disputed question is whether overtime shall be paid crew members working 12 hours in a day in addition to the monthly salary at the prorate rate". That remark for the reasons already shown does not apply to "broken assignments".

As we see it the problem is a composite one and can be stated in a series of related facts:

1. The stipulation *pendente lite* provided that if this Court affirmed the District Court the *"new watch rules"* should be *retroactive* to March 1, 1928 (R. 29); and the final judgment directed retroactive back pay accordingly (R. 34).

2. The effect of the retroactive application of the award was to require all parties to consider the 12-24 hour watch for assigned crews—abolished by the award—as non-existent from and after March 1, 1928; and to settle for the services of plaintiffs' assignors during the six months following March 1, 1928 on that hypothesis.

3. Thus, for the purposes of the settlement at the end of the six months period the assignors must be considered as men who had worked 12 hours on watch and then 24 hours *without any contract provision* permitting such an assignment of crews.

4. The only assigned crews permitted under the retroactive award (with exceptions herein imma-

terial) were (Award, R. 25) provided by the amended Section 6 to "work on the basis of eight hours or less each day *for six consecutive days.*"

5. None of the assignors worked six consecutive days; therefore it cannot be said that they worked on the only permissible basis under the amended Section 6.

6. But during the time the former 12-24 hour men, the assignors, continued to work on watches of that character they were paid the increased rates of monthly pay provided by Section 2, which monthly rates applied to all employes of each class, regardless of watch, but were payable if and only if, the employee worked all watches in a month. (Rule to Section 2—unchanged.)

7. Referring now solely to these "full service" assignors who worked every watch in a given month on a 12-24 basis, the question is whether there can now be applied to them Rule 8, "overtime", which provides that the "monthly salary * * * shall cover the *present recognized* straight time assignment" in the face of the fact that the settlement at the end of the six months was necessarily based on the stipulated hypothesis that during those six months the award was in effect, under which award *there was no recognized straight time assignment* except that of *eight hours per day for six consecutive days* under amended Rule 6—an assignment which none of the assignors held or worked at during those six months.

We respectfully submit that appellants cannot legitimately claim that the award was retroactive and

at the same time claim that they were entitled to monthly pay for a class of watch that the award abolished, but that the monthly pay should apply only for the first eight hours of each tour of duty, and then claim that they may switch over to the eight-hour-six-consecutive-day watch, which they did not work and on that different basis claim four hours overtime at eight hour pay.

Here again, as in the case of the "broken assignment" months, the question is not what the Hancock formula means or does not mean or what Mr. Hancock or Mr. Deal or any one else thinks it means.

The plain and simple question is: How much money, altogether, did the "full service" men receive for each full service month, and is that a fair compliance with the stipulation and judgment?

In the contract *as amended by the award* there can be found no provision whatever that authorizes the carrier to create a 12-24 hour assigned crew. Nowhere in that amended contract is there any provision that authorizes a monthly salary for other than "the present recognized straight time assignment" and treating the award as retroactive to March 1, 1928, the only "present recognized straight time assignment" during the six months in question was the one provided by the amended Section 6 upon which not one of the "full-service" men worked.

To say, as did appellants' counsel, that the monthly salary should be retained for the first 8 hours of the 20 or 21 watches actually worked in a full month's service, because those were all the watches assigned

to the men, is to beg the question. Rule 8 says the "present recognized straight time assignment", and if the award be treated as retroactive, there was none other that answered that description than eight hours per day for *six consecutive* days.

APPELLEES' POSITION MISUNDERSTOOD.

The majority opinion says:

> "Appellee's position is that the shipowner could assign a watch to a seaman of 2 hours on Monday; 14 hours on Tuesday; 4 hours on Wednesday; 16 hours on Thursday; 2 hours on Friday; and 10 hours on Saturday, and still owe him no overtime."

This statement is based on a somewhat reckless statement to that effect in appellants' brief, unsupported by any fair references to the record.

We do not and never have taken any position that leads to that conclusion.

Rule 5 (R. 70), which was not submitted to arbitration, provides (R. 70) that: "Eight consecutive hours shall constitute a day's work."

The eight hour watch was for "eight hours *or less* on watch each day for six consecutive days" (Rule 6) as it stood before the award (R. 70) and as the award amended it. (R. 25.)

Counsel for appellants knew better than to take so unjustified a position, and certainly any fair consideration of the evidence and of our reply brief will

not show that at any time we have placed any such interpretation on the award.

While the majority opinion is technically correct in calling appellees "ship owners" and appellants' assignors "seamen", both are in fact under the Railway Labor Act, and the rule that eight hours *or less* constitute a day's work is universal in all branches of service that are covered by contracts under that Act.

Referring again to the quotation next above, the "seamen" would, *under the contract provisions,* have received a full 8 hour day pay for Monday, Wednesday and Friday and 6 hours overtime on Tuesday, 8 on Thursday and 2 on Saturday in addition to pay for an 8-hour day on Tuesday, Thursday and Saturday.

Appellants' counsel merely created a "man of straw" which had no body or substance.

It must be remembered that the situation was a novel one. These assignors were working on 12-24 hour watches when the arbitration agreement was made. And when the award was made, pending an effort to impeach it, they merely continued on the boats that operated on a 12-24 hour basis. There was no economic pressure brought to bear to compel them to keep on serving the 12 hour watches. No one knew but what the award might have been set aside. The stipulation is evidence of an uncertain state of mind common to both sides. If the award had not been set aside the plaintiffs' assignors would have had

no extra pay due them; the "full service" men would have had currently the full month's pay common to all classes of watches; the broken assignment men would fully have been paid under contract rules.

The situation affords no precedent for future relations between the parties; it is extremely unlikely that it will ever occur again.

In this case there is no magic in the word overtime. If the overtime rate was punitive and larger than the straight-time rate there would be justification for the observance of the distinction. Much of the confusion in the record was caused by the stubborn use by respective sides of "overtime pay" and "back pay".

But as the majority opinion points out, the overtime hourly rate is the straight-time hourly rate and it can make no difference to a man or to his assignee whether he has, for a twelve hour watch, received an eight hour man's daily pay for the first eight hours and four hours overtime pay at the eight hour man's "overtime rate", or whether he receives 12 times the eight hour man's hourly rate.

We trust that in the light of this—a somewhat different presentation of this point from that made in our Reply Brief, the Court will see fit to recede from the statement in the majority opinion that if our principle of interpretation be correct "the 12-hour watch could be restored without the deterrent of the overtime." The Railway Labor Act expressly contemplates

that all regular service, rates of pay, rules and working conditions of a given class of employes shall be governed by a contract under the provisions of the act, and must be embodied in that contract, either expressly or by necessary implication. To hold otherwise would be to render the act abortive. To say that under the existing contract of the Ferryboatmen, as amended by the award and especially in the face of the arbitration proceedings, a system of 12-24 watches could now be set up without paying overtime, and in face of the specific provision in the contract that 8 hours or less will constitute a day's work, is, we respectfully submit, a conclusion that, upon analysis, will not be found to be sustainable under the Railway Labor Act, or any fair principle of interpretation of contracts.

We think it true that special contracts may be made by employes who are covered by general contract under the Railway Labor Act, or even that such employes may in special cases recover upon a quantum meruit, but that such course may be followed as a practice to thwart and nullify the express intention of Congress, or to escape the effect of a contract made by a majority of the class, is, we believe, unsustainable, on grounds both of statutory construction and public policy.

The difficulty in arriving at a settlement with the "full service men" at the end of the six months period lay in the fact that they had been working watches that were not provided for in the contract as amended, and in the further consideration that to pay them an

additional amount per hour, or per 8 hour day to that paid the 8-16 men that worked during the same period and in the same class of service, would be to discriminate against the 8-16 men (under the plaintiffs' claim) to the extent of about 16 per cent per hour and thus in effect nullify one of the major purposes of the arbitration with which we have dealt extensively in our Reply Brief, which was to equalize the hourly pay of both the 8 and 12 hour classes of employes.

It is not correct, and we desire to emphasize this denial as strongly as we may, that, as stated on page 4 of the majority opinion, our interpretation of the eight hour assignment per day of straight time is that it means "any 48 hours per six days distributed at the convenience of the employer."

The final settlement with these "full service" men is illustrated by Finding XV (R. 134), which is based on plaintiffs' Exhibit 8A and on the Gorman testimony and is the case of A. L. Costa, Fireman No. 8, on plaintiffs' Exhibit 8A, page on, who worked every 12 hour period during six months without any layoff at all. (Gorman R. 252.) Gorman says: "His overtime pay was figured month by month under the formula."

If the reader will examine that table, it will be seen that Costa, in the twenty-one watch months was paid a total of $176.74, made up of the monthly salary of $146.35, the same salary paid to an 8 hour fireman plus $30.39 additional pay. Whether that additional check be called "back-pay" or "additional overtime"

is merely quibbling, because the straight time pay and the overtime pay per hour are exactly the same.

In a 21 watch month he served 252 hours or 31½ eight hour days amounting to $176.74, which is equal to 31½ eight hour days at $5.1069 per day, or computing that time on an hourly basis, the $176.74 is equal to 252 hours at 70.14 cents per hour. The same computation applies exactly to each of the months shown in the table in Finding XV (R. 134). We repeat that Costa was not working on any watch recognized by Rule 8, which was unchanged by the award. The method adopted was exactly the same as that which would have been followed if an 8-16 hour man had worked the same number of 12 hour watches in the month through stress of circumstances or unusual conditions.

The construction contended for by appellants and apparently adopted by the majority opinion is based upon considerations outside of the record and irrelevant to the case. As said by Judge Wilbur in the dissenting opinion, the fact that the carrier neglected to secure six successive days labor from plaintiffs' assignors is no reason why it should be punished correspondingly. "This is not the question involved. It is a simple question of the interpretation of a contract as amended by the award."

It certainly could not have been within the contemplation of the majority of the Arbitration Board that any such result would follow their equalization.

They endeavored to and did remove a ten to twelve per cent hourly differential against the 12-hour employees by abolishing the 12-hour assigned crews. Nor could it have been within the intent of the parties to the stipulation, or the Court itself, that the equalization made by arbitration should be dislocated in the event of an affirmance of the District Court judgment by "paying these full service men" during any one calendar month the same monthly rate of pay that the 8-hour men received and then an additional allowance for overtime, the net result of which would be to give the full service men on the settlement 16 per cent more per hour than their fellow workers received during the same month.

IN CONCLUSION, it is respectfully submitted that a rehearing herein should be granted:

(1) For the purpose of considering and definitely determining the proper basis of settlement that should have been made at the end of the six month period for each broken assignment month;

(2) To reconsider the question of the proper basis of settlement for the full service months and the unfair and inequitable consequences that flow from the position taken by appellants; and

(3) That if it again be decided not to affirm the decree but to remand the case for further proceedings in accordance with the opinion of this Court, the Court below be given certain and definite rules for application to the two classes of services performed by plain-

tiffs' assignors; and thus prevent any confusion in the hearing in the District Court and any speculation by that Court as to what rules should be followed, and further, and perhaps of equal importance, to remove as far as practicable the incentive to either party again to appeal to this Court from the final decree of the District Court.

Dated, San Francisco, California,
July 29, 1936.

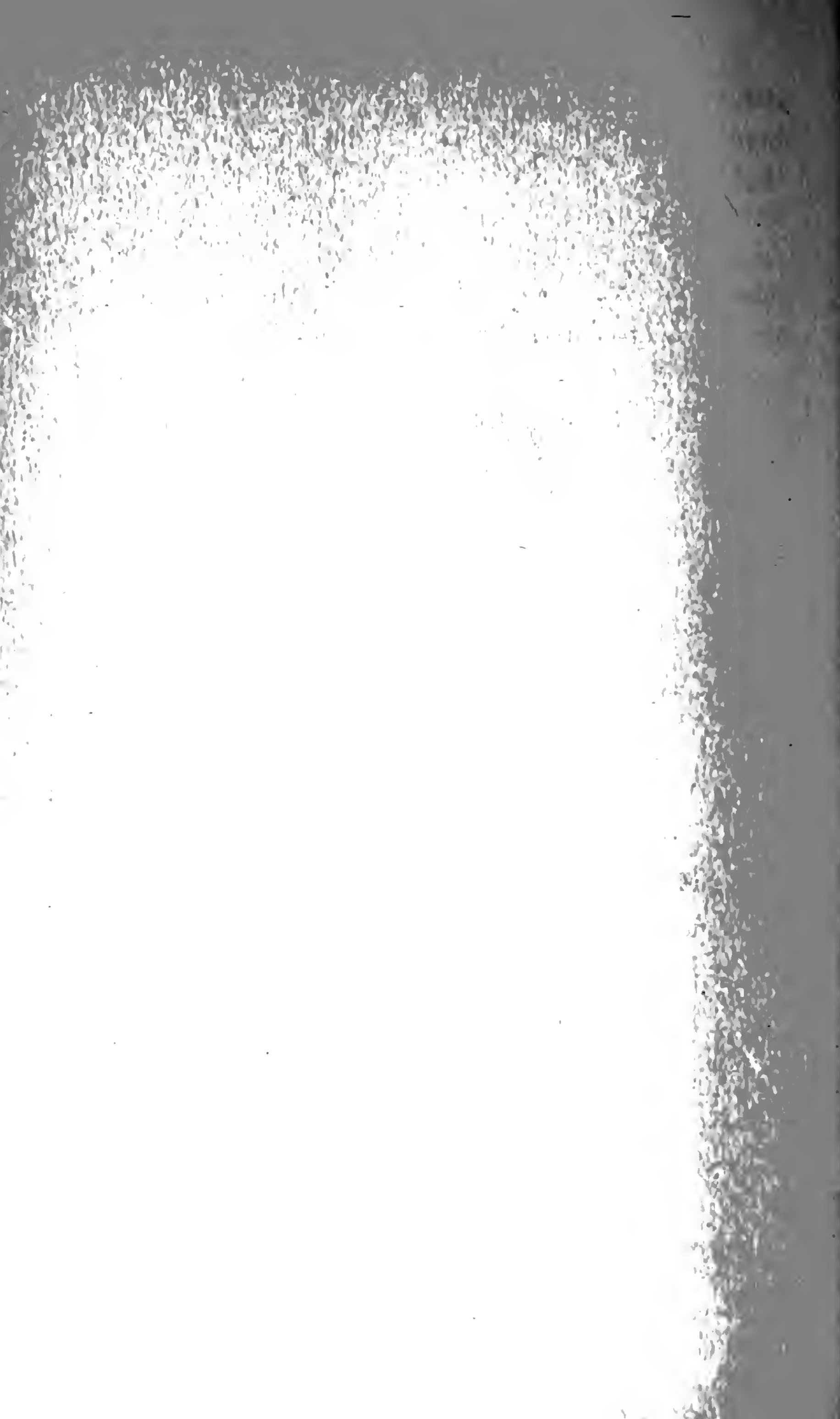
Respectfully submitted,
HENLEY C. BOOTH,
A. A. JONES,
Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellees and petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 29, 1936.

HENLEY C. BOOTH,
A. A. JONES,
Counsel for Appellees and Petitioners.



No. 8149

14

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

WISNOM COMPANY,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

FILED

MAY 4 1936

PAUL P. O'BRIEN,
CLERK

Parker Printing Co., 545 Sansome Street, San Francisco 60—4-20-36

No. 8149

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

WM. A. GARLICK, Esq.

For Respondent:

JAMES T. HASLAM, Esq.

Docket No. 74891

WISNOM COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1934

Feb. 16—Petition received and filed. Taxpayer notified. (Fee paid).

Feb. 16—Copy of petition served on General Counsel.

Mar. 15—Answer filed by General Counsel.

Mar. 21—Copy of answer served on taxpayer.

1935

Apr. 13—Joint motion to place on day calendar of 4/24/35 filed by the parties. 4/15/35 granted.

Apr. 18—Stipulation of facts filed.

Apr. 24—Hearing had before Mr. Murdock, Division 3. On motion of Commissioner—stipulation of facts offered in evidence and case submitted. No briefs.

1935

Aug. 21—Memorandum opinion rendered — Mr. Murdock, Division 3. Decision will be entered under Rule 50.

Sept. 3—Motion for order of redetermination filed by General Counsel.

Sept. 5—Hearing set Sept. 25, 1935 on settlement, Rule 50.

Sept. 16—Consent to settlement filed by taxpayer.

Sept. 24—Decision entered—Mr. Murdock, Division 3.

Dec. 14—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

1936

Jan. 3—Proof and affidavit of service filed by General Counsel.

Feb. 8—Motion for extension to March 31, 1936 to complete and transmit record filed by General Counsel.

Feb. 8—Order enlarging time to 3/31/36 to prepare and deliver record entered.

Feb. 28—Praecipe filed—proof of service thereon. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:E-4, AMcM-60D, dated January 17, 1934, and as a basis of its proceedings alleges as follows:

Jurisdiction in the Board:

1. The petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 231 Second Avenue, San Mateo, California.

2. The notice of deficiency, a copy of which is attached hereto, marked Exhibit "A", was mailed to the petitioner on or after January 17, 1934.

3. The taxes in controversy are income taxes for the calendar year 1931, and are less than Ten Thousand Dollars ($10,000.00), to wit: Three Hundred Dollars, ($300.00).

The deficiency claimed by the Commissioner of Internal Revenue was Four Hundred Seventy-six and 89/100 Dollars [2] ($476.89), of which amount the petitioner conceded One Hundred Seventy-six and 89/100 Dollars, ($176.89), and paid the latter amount, together with interest, to the Collector of Internal Revenue at San Francisco, California, on January 26, 1934. See official receipt attached hereto, marked Exhibit "B".

4. Wherefore, the petitioner now alleges that the Board has full jurisdiction of the controversy.

Assignment of Error:

5. The determination of the disputed portion of the deficiency, to wit: Three Hundred Dollars, ($300.00), set forth in said notice of deficiency is based upon the following error:

The Commissioner of Internal Revenue disallowed a deduction of Two Thousand Five Hundred ($2,500.00), taken by the petitioner in determining its stautory net income for Federal income tax purposes for the calendar year 1931, on the ground that said expenditure was made for the purpose of defeating legislation and, therefore, was not deductible under the provisions of 23(n) of the Revenue Act of 1928, and Article 262 of Regulations 74, whereas, said expenditure was an ordinary and necessary expense, under the provisions of Section 23(a) of the Revenue Act of 1928, and Article 121 of Regulations 74, and, therefore, legally deductible.

Statement of Facts:

6. The petitioner, Wisnom Company, is a close held, family corporation which was founded and incorporated March 21, [3] 1904, by Mr. Robert Wisnom, now deceased, father of the present stockholders, for the purpose of taking title to his many San Mateo real property holdings and improving, operating and conserving them as a major part of his substantial estate.

7. The petitioner's principal business is the owning, holding, operating, leasing and renting of im-

proved real estate within the commercial district of the City of San Mateo, State of California.

8. The City of San Mateo is credited with a population of 13,444, by the United States census of 1930 and has an area of 9.75 square miles.

9. Said city is zoned by Ordinance No. 235, adopted by the City Council, March 20, 1922. The present city charter was adopted in the year 1923 and ratifies previously adopted ordinances. Several minor amendments have been made to Ordinance No. 235, none of which are relevant to or affect the instant case.

10. There is attached hereto, marked Exhibit "C", a photostatic copy of a portion of said city's official zoning map, which, in conjunction with said Ordinance No. 235, classifies the property thus:

First Residential, indicated by the color pink.
Second Residential, indicated by the color blue.
Commercial District, indicated by the color yellow.
Light Industrial, indicated by the color brown.
Heavy Industrial, indicated by the color green.
Apartment House, indicated by the cross sections.

11. The major portion of the petitioner's improved, [4] rental property is located in blocks 4, 5, 8 and 9 of the Taylor Addition and block 15 of the Brewers Subdivision of the City of San Mateo, and all of it is within the Commercial District zone and in the heart of the principal business center of

said city. These properties are indicated by a red outline or border, on the zoning map, Exhibit "C".

12. A considerable portion of the Commercial District of the City of San Mateo has not been improved and utilized, to the ultimate degree, as commercial business property. This is particularly true of the east and south portion of the district, and there is ample room or area within this district to accommodate such future growth of business as may be required by increased population, over a long period of years.

13. Heretofore, the movement or trend of business, in said city, has been toward the north and south, and in the extreme south of the city one street has been zoned as commercial for a distance of several blocks.

14. However, the most recent trend of business is toward the west, along Baldwin, Second and Third Avenues.

15. Since the inception of the zoning laws of various "peninsula" municipalities, including the City of San Mateo, there has been repeated attempts made, by selfish interests, to modify, break down, or repeal the zoning ordinances.

16. In the year 1931, the Baywood Park Company, a corporation, were the owners of many acres of level and valuable land within the City of San Mateo. Said land fronts on El Camino Real, on the west side thereof, and Blocks A, B, C, E and F, thereof, are shown on Exhibit "C", hereto attached. [5]

17. The aforesaid blocks, A, B, C, E and F, were and now are zoned as "Second Residential District", and Third Avenue intersects the tract between blocks B and F.

18. The corporation, Baywood Park Company, for the purpose of enhancing the value of their property and reducing sales resistance, desired to change the zone classification of Lots 1 to 14, inclusive, of Block B, and Lots 1 to 7, inclusive, of Block F, from "Second Residential District" to "Restricted Business District", and inaugurated a powerful movement to obtain such rezoning.

19. The owners of the property within the present Commercial District, one of which was the petitioner, realizing the danger to their property values and rental incomes in the event the business district was extended across and west of El Camino Real and, for the purpose of preventing irreparable damage to said property values, immediately effected an informal organization and strenuously opposed the rezoning movement.

20. The Baywood Park Company, by agreeing to reimburse the City of San Mateo for all expenses incurred by the city in the rezoning movement, induced the City Planning Commission to recommend to the City Council, that Ordinance No. 235 be amended to classify Lots 1 to 14, inclusive, in Block B, and Lots 1 to 7, inclusive, in Block F, fronting on Third Avenue immediately west of El Camino Real, as "Restricted Business District".

21. On October 5, 1931, the San Mateo City Council passed Resolution No. 31, authorizing a special municipal election to be held Tuesday, November 17, 1931, for the purpose of determining this rezoning question. [6]

22. Said special election was held November 17, 1931.

23. No other questions or matters were submitted to the electorate at said special municipal election and the rezoning movement was defeated.

24. The cost of this rezoning activity, to the City of San Mateo, was Four Hundred Sixty-two and 73/100 Dollars, ($462.73).

25. In due course, the Baywood Park Company paid to the City of San Mateo, Four Hundred Sixty-two and 73/100 Dollars, ($462.73), in accordance with their agreement with the City of San Mateo, entered into before the election was authorized and called.

26. The petitioner's proportionate share of the expense incurred in defeating the aforesaid rezoning movement was Two Thousand Five Hundred Dollars, ($2,500.00).

27. Said Two Thousand Five Hundred Dollar, ($2,500.00), expense was incurred and paid by the petitioner in the calendar year 1931.

28. In determining its statutory net income for Federal income tax purposes for the calendar year 1931, the petitioner deducted the said Two Thousand Five Hundred Dollars, ($2,500.00), as an ordinary and nesessary business expense, under the pro-

visions of Section 23(a) of the Revenue Act of 1928, and Article 121, Regulations 74.

29. The respondent disallowed said deduction of Two Thousand Five Hundred Dollars ($2,500.00). [7]

WHEREFORE, the petitioner prays:

(a) That this Board may hear this proceeding,

(b) That this Board find and hold that the respondent erred in disallowing said Two Thousand Five Hundred Dollars, ($2,500.00), deduction, and

(c) Redetermine the deficiency for the calendar year 1931 to be One Hundred Seventy-six and 89/100 Dollars, ($176.89).

It is respectfully suggested that the respondent refer this petition to the Technical Staff's representative at San Francisco, California, for the purpose of effecting a stipulation of facts, if possible, and, perhaps, settling this case out of Court.

WM. A. GARLICK

Counsel for Petitioner,
625 Market Street,
San Francisco, California. [8]

VERIFICATION.

State of California,
City and County of San Mateo—ss.

JOHN WISNOM, being first duly sworn, deposes and says: that he is an officer, to-wit, the president of WISNOM COMPANY: that said company is a corporation and for that reason affiant makes this verification for and on its behalf; that he has read

the above Petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

JOHN WISNOM

Subscribed and sworn to before me this 10th day of February, 1933.

[Seal] ELLA S. IRVING,

Notary Public in and for the City and County of San Mateo, State of California. [9]

EXHIBIT "A".

TREASURY DEPARTMENT
WASHINGTON

January 17, 1934.

Office of
Commissioner of Internal Revenue

Wisnom Company,
231 Second Avenue,
San Mateo, California.

Sir:

You are advised that the determination of your income tax liability for the year(s) 1931 discloses a deficiency of $476.89 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sun-

day as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing this form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest at the rate of 6% per annum will accumulate.

Respectfully,
GUY T. HELVERING,
Commissioner.
(Signed) By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870 [10]

STATEMENT.

IT:AR:E-4
AMcM-60D

In re: Wisnom Company,
231 Second Avenue,
San Mateo, California
Income Tax Liability.

Year—1931.
Income Tax Liability—$16,004.54.
Income Tax Assessed—$15,527.65.
Deficiency—$476.89.

Reference is made to office letter dated December 8, 1933, advising you of the approval of the report submitted by the internal revenue agent in charge at San Francisco, California, a copy of which was transmitted to you under date of September 20, 1933, and which report is made a part of this letter.

Careful consideration has been given to your protest dated December 12, 1933, in which exception is taken to the disallowance of an item of $2,500.00 paid for the purpose of defeating a proposed change in the zoning laws of the City of San Mateo.

You are advised that the item in question is considered to be an unallowable deduction under the provisions of section 23(n) and article 262 of Regulations 74.

You are further advised that the Bureau does not regard the decision in the case of G. T. Wofford (49 F (2d) 1027) as establishing a binding prece-

dent to be followed in the adjustment of other cases where the circumstances are not closely analogous. In view of this action it is not considered advisable to refer the matter to the office of the General Counsel as requested in your protest.

A copy of this letter, together with a copy of the statement, has been mailed to your representative, Mr. William A. Garlick, 625 Market Street, San Francisco, California, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau. [11]

EXHIBIT "B".

RECEIPT FOR PAYMENT OF TAXES.

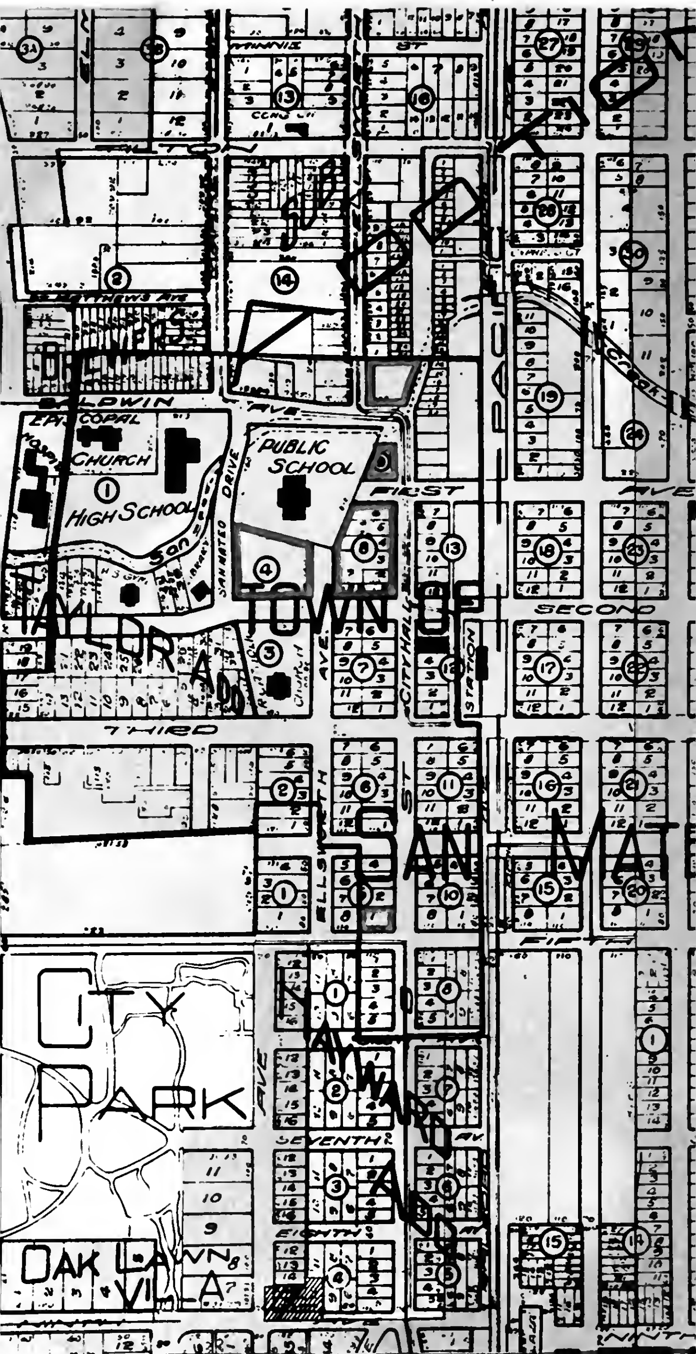
COLLECTOR'S OFFICE, 1st District of Cal.
at S. F. Date Jan. 26, 1934.
RAR Addl. 1931

Addl. Tax	$176.89
Int. to 1/26/34	16.21
Amount	$193.10

Wisnom Company
231 Second Avenue
San Mateo, California

First Calif. Dist.
Paid
Jan. 26, 1934
John V. Lewis
Collector

[Endorsed]: Filed Feb. 16, 1934. [12]



ORTION OF OFFICIAL ZONING MAP

City of San Mateo
California

EXHIBIT "C"

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2, 3 and 4. Admits the allegations contained in paragraphs 1, 2, 3 and 4 of the petition.

5. Denies that the determination of the deficiency tax is based upon error as alleged in the paragraph of the petition numbered 5.

6, 7 and 8. Admits the allegations contained in paragraphs 6, 7 and 8 of the petition.

9 to 27, inclusive. Denies the allegations contained in paragraphs 9 to 27, inclusive, of the petition.

28 and 29. Admits the allegations contained in paragraphs 28 and 29 of the petition.

Denies each and every allegation of fact not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) ROBERT H. JACKSON
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
EUGENE G. SMITH,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed U. S. Board of Tax Appeals, Mar. 15, 1934. [14]

[Title of Court and Cause.]

James T. Haslam, Esq., for the petitioner.

MEMORANDUM OPINION.

MURDOCK: The Commissioner determined a deficiency of $476.89 in the petitioner's income tax for the year 1931. A part of the deficiency is due to the disallowance of a deduction of $2,500 representing an amount paid in 1931 for the purpose of defeating a proposed change in the zoning laws of the city of San Mateo, California. The error assigned is the action of the Commissioner in disallowing the deduction of $2,500 as an ordinary and necessary expense within the meaning of section 23(a) of the Revenue Act of 1928. The facts have been stipulated. The question here is whether this expenditure was an ordinary and necessary expense of carrying on the business of the taxpayer.

The petitioner owned many pieces of real estate within the commercial district zone of San Mateo. Its principal business was owning, improving, holding, operating, leasing and renting its own real estate. In 1931 the owners [15] of certain property then within a residential zone tried to effect a change in zoning whereby additional areas would be classified as "Restricted Business District" by a city ordinance. The petitioner and others owning property in the commercial district informally organized and successfully opposed the movement to rezone because they feared their property values and rentals would be reduced. The proposed change

was defeated in an election held on November 17, 1931. The petitioner paid its proportionate share of the expense of defeating the movement to re-zone. The payment was made in 1931 and amounted to $2,500.

The petitioner has made a prima facie case. There is no reason to suppose that the measures taken by the petitioner and its associates were improper or illegal. The petitioner is entitled to the deduction. G. T. Wofford, 15 B. T. A., 1225, aff'd. 49 Fed. (2) 1027.

Decision will be entered under Rule 50.

[Endorsed]: Entered Aug. 21, 1935. [16]

United States Board of Tax Appeals.
Docket No. 74891.

WISNOM COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Board's Memorandum Opinion entered August 21, 1935, the respondent filed a proposed computation and notice of settlement on September 3, 1935. On September 16, 1935 the petitioner

filed a notice of acquiescence in the respondent's computation. Therefore, it is

ORDERED and DECIDED that there is a deficiency for the year 1931 in the amount of $176.89.

[Seal] (s) By J. E. MURDOCK
Member,
United States Board of Tax Appeals.

[Endorsed]: Entered Sep. 24, 1935. [17]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENT OF ERRORS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and Irving M. Tullar, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Your petitioner for review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America, holding his office by virtue of the laws of the United States of America. Your respondent (hereinafter referred to as the taxpayer) is a corporation organized and existing under and by virtue of the laws of the

State of California, with its principal office at 231 Second Avenue, San Mateo, California. The taxpayer filed its income tax return for the year involved herein with the Collector of Internal Revenue for the State of California, whose office is located in the City of San Francisco, California, [18] and in the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined a deficiency in income tax for the calendar year 1931 in the amount of $476.89.

In accordance with the provisions of Section 272 of the Revenue Act of 1928, the Commissioner, on January 17, 1934, sent to the taxpayer, by registered mail, a notice of said deficiency. The taxpayer filed an appeal with the United States Board of Tax Appeals in which the deficiency determined by the Commissioner was conceded to the extent of $176.89 and contested as to the amount of $300.00, and sought redetermination thereof.

The appeal was filed on February 16, 1934, and answer thereto filed on March 15, 1934.

The cause was submitted to the Board on an agreed stipulation of fact and, on August 21, 1935, the Board promulgated its finding of fact and opinion and, on September 24, 1935, entered its final order of redetermination wherein and whereby the Board ordered and decided that there was a

deficiency for the year 1931 in the amount of $176.89.

III.

The nature of the controversy is briefly described as follows:

The taxpayer is the owner of real estate in the commercial district of San Mateo, California, which it improves and rents. Owners of other property organized to change their property then zoned as "residential" [19] to "restricted business". The taxpayer and other commercial property owners organized to oppose the change. A rezoning ordinance was submitted at a special election and was defeated. The expenses incurred in the activities of the taxpayer and other commercial property owners to defeat the rezoning ordinance were apportioned against the several property owners, the taxpayer being required to pay $2,500.00, which it claimed as a deduction from gross income for the year 1931. The deduction was disallowed by the Commissioner.

IV.

The United States Board of Tax Appeals held that the taxpayer was entitled to the deduction.

V.

The Commissioner says that in the decision and final order entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner and he assigns the following errors, and each of them, which he avers, occurred in the decision and final order of rede-

termination and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred as a matter of law in holding and deciding that the taxpayer was entitled to deduct as an ordinary and necessary expense an amount expended to defeat proposed legislation.

2. The Board erred as a matter of law in failing to hold and decide that the taxpayer was not entitled to deduct the amount expended to defeat proposed legislation. [20]

WHEREFORE, the Commissioner petitions that the decision and order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN
Assistant Attorney General.

(Signed) HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

Of Counsel:

IRVING M. TULLAR,
Special Attorney,
Bureau of Internal Revenue.

United States of America
District of Columbia—ss.

IRVING M. TULLAR, being duly sworn, says that he is Special Attorney of the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Signed) IRVING M. TULLAR

Sworn and subscribed to before me this 14 day of December, 1935.

(Signed) GEORGE W. KREIS
Notary Public.

My commission expires Nov. 16, 1937.

[Endorsed]: U. S. Board of Tax Appeals. Filed Dec. 14, 1935. [21]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: Wisnom Company,
231 Second Avenue,
San Mateo, California.

To: William A. Garlick,
625 Market Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue, did, on the 14 day of December, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and assignment of errors, as filed, is attached and is served on you.

Dated this 14 day of December, 1935.

(Signed) HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is acknowledged this 20 day of December, 1935.

....

Respondent on Review.

(Sgd) WM. A. GARLICK
Attorney for Respondent on Review. [22]

[Title of Court and Cause.]

PROOF OF SERVICE OF NOTICE OF FILING PETITION FOR REVIEW.

State of California
City and County of San Francisco—ss.

Louis Braunagel, being first and duly sworn, deposes and says:

I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this Notice was issued.

On the 19th day of December, 1935, I served the annexed Notice of Filing Petition for Review on the Wisnom Company, a corporation in the person of David Wisnom, Secretary-Treasurer of the corporation, at 164 B Street, San Mateo, California, by delivering to and leaving with him personally a copy of the said Notice of Filing Petition for Review and a copy of the Petition for Review and Assignment of Errors and at the same time exhibiting to him the annexed original Notice.

(s) LOUIS BRAUNAGEL

Subscribed and sworn to before me this 19th day of December, 1935.

(s) HARRISON N. RIGG
Internal Revenue Agent.

[Endorsed]: U. S. Board of Tax Appeals. Filed Jan. 3, 1936. [23]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies of the documents and records in the above-entitled cause in connection with the petition for review by the said United States Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Board in the above-entitled proceeding.
2. Pleadings before the Board.
3. Memorandum opinion promulgated August 21, 1935.
4. Petition for review and notice of filing petition for review with acknowledgment of service endorsed thereon.
5. This praecipe.

(Signed) HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

Service of a copy of the within praecipe is hereby admitted this 20 day of February, 1936.

(Sgd) WM. A. GARLICK
Attorney for Respondent.

[Endorsed]: U. S. Board of Tax Appeals. Filed Feb. 28, 1936. [24]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 24, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of March, 1936.

[Seal] B. D. GAMBLE

Clerk,

United States Board of Tax Appeals.

[Endorsed]: No. 8149. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Wisnom Company, Respondent. Transcript of the Record Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed March 17, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.